(7)

Supreme Court, U.S.
FILED
MAY 17 2005
OFFICE OF THE CLERK

No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED: FEBRUARY 28, 2005

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1389-A

JUANITA ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/17/02	1	NOTICE OF REMOVAL from Circuit Court of Fairfax County by Lincoln Property, Invesco, SWIB Investment; FILING FEE $150.00 RECEIPT # 100158024; jury demand by pltf; No Answer Filed (pwhi) [Entry date 09/18/02]
		* * * * *
10/3/02	9	Consent Order that this action is hereby consolidated into CA 02-1390-A. – ent. & filed. (signed by Judge Leonard D. Wexler) Copies Mailed: yes (wpin) [Entry date 10/10/02]
10/3/02	--	Consolidated Member Case. Lead Case Number: 02 CV 1390 (wpin) [Entry date 10/10/02]

10/8/02	10	MOTION by SWIB Investment, Invesco, Lincoln Property to Dismiss (wpin) [Entry date 10/10/02]
10/8/02	11	MEMORANDUM by Lincoln Property, Invesco, SWIB Investment in support of [10-1] motion by SWIB Investment, Invesco, Lincoln Property to Dismiss by SWIB Investment, Invesco, Lincoln Property (Large Pleading) (wpin) [Entry date 10/10/02] [Edit date 10/10/02]

* * * * *

10/21/02	13	Consent Order; ORDERED that Juanita Roche v. Lincoln Property Co., et. al. No. 02-1389-A is hereby closed (See order for details) (signed by Judge Gerald B. Lee) Copies Mailed: yes (pwhi) [Entry date 10/22/02]
10/21/02	--	Case closed (pwhi) [Entry date 10/22/02]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/17/02	1	NOTICE OF REMOVAL from Circuit Court of Fairfax County by Lincoln Property Co., Invesco, Swib Investment Co; FILING FEE $150.00 RECEIPT # 100158023; jury demand (wpin) [Entry date 09/18/02]

* * * * *

10/3/02	11	Consent Order that the action captioned Juanita Roche v Lincoln Property Co, et al, No. 02-1389-A is hereby consolidated in to the above action. – ent. & filed. (signed by Judge Leonard D. Wexler) Copies Mailed: yes (wpin) [Entry date 10/04/02]
10/3/02	--	Consolidated Lead Case (wpin) [Entry date 10/10/02]

* * * * *

10/8/02	13	MOTION by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (wpin) [Entry date 10/09/02]
10/8/02	14	MEMORANDUM by Lincoln Property Co., Invesco, Swib Investment Co in support of [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (Large Pleading) (wpin) [Entry date 10/09/02] [Edit date 10/10/02]

* * * * *

10/22/02	--	CASE reassigned to Judge Gerald B. Lee (per direction of CMH chambers) (pmil)

* * * * *

10/25/02	19	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (wpin) [Entry date 10/28/02]
10/25/02	20	MOTION by Juanita Roche, Christophe Roche for Leave to File amended complaint (wpin) [Entry date 10/28/02]
10/25/02	21	MEMORANDUM by Christophe Roche, Juanita Roche in support of [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 10/28/02]

* * * * *

11/7/02	23	MEMORANDUM by Lincoln Property Co., Invesco, Swib Investment Co in opposition to [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 11/12/02]

11/13/02	26	REPLY by Lincoln Property Co., Invesco to response to [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss (clar) [Entry date 11/14/02]
11/15/02	--	Minute entry: (GBL) r: Wilson. Appearances: Counsel. Onfor hearing on deft motion to dismiss – argued and granted as to the original complaint w/leave to amend. However, the proposed Amended Complaint submitted w/Motion to Amend is not accepted and pltf may file a Second Amended Complaint w/i 20 days – deft response due w/i 20 days thereafter. Order to follow. (jsol)
11/27/02	27	MEMORANDUM ORDER for reasons stated, [20-1] motion by Juanita Roche, Christophe Roche for Leave to File amended complaint is granted w/i 20 days of this Order. The Court declines to accept the proffered Amended Complaint as pltf did not have benefit of this ruling. Deft haf 20 days thereafter to respond. [13-1] motion by Swib Investment Co, Invesco, Lincoln Property Co. to Dismiss is granted as to the original complaint and Further Ordered that INVESCO Institutional is dismissed from this action. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 12/3/02] (jsol) [Entry date 12/03/02]
12/16/02	28	SECOND AMENDED COMPLAINT by Christophe Roche, Juanita Roche amending [28-1] amended complaint by Juanita Roche, Christophe Roche; jury demand (wpin) [Entry date 12/17/02] [Edit date 12/17/02]

* * * * *

1/6/03	29	ANSWER by Swib Investment Co (Attorney Michael Robert Goodstein) to second amended complaint (lkin) [Entry date 01/07/03]

* * * * *

1/6/03	31	ANSWER by Lincoln Property Co. to second amended complaint (wpin) [Entry date 01/07/03]

* * * * *

1/30/03	37	MOTION by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/03/03]
1/30/03	38	MEMORANDUM by Lincoln Property Co., Swib Investment Co in support of [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/03/03]

* * * * *

2/4/03	45	Supplemental Brief by Lincoln Property Co., Swib Investment Co in support of [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar)

* * * * *

2/5/03	47	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar) [Entry date 02/06/03]

* * * * *

2/6/03	49	Response to rebuttal by Christophe Roche, Juanita Roche to [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar)
2/6/03	50	Rebuttal brief in support by Lincoln Property Co., Swib Investment Co of [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. (clar)
2/7/03	--	Minute entry: Judge Sewell. Reporter: Rudgier & Green. Appearances of counsel for pltf and dft. Matter came on as dft's motion to compel discovery, dft's motion for sanctions and dft's motion to exclude Richard Bernstein, MD testimony. Matter is argued and dft's motion to compel discovery is granted, Dft's motion for sanctions is denied and dft's motion to exclude testimony of Richard Bernstein, MD is denied. Order to follow (kjon)
2/7/03	51	ORDER for the reasons stated from the bench [34-1] motion by Swib Investment Co, Lincoln Property Co. to overrule assertions of Fifth Amendment privilege and to further depose pltfs is GRANTED; Dft's motion for production of documents is GRANTED; [37-1] motion by Swib Investment Co, Lincoln Property Co. to exclude testimony of Richard Bernstein, M.D. is DENIED; [34-2] motion by Swib Investment Co, Lincoln Property Co. for Rule 37(a) Sanctions is DENIED (signed by Magistrate Judge Welton C. Sewell) Copies Mailed: Yes [EOD Date: 2/10/03] (kjon) [Entry date 02/10/03]

2/7/03	52	MOTION by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche (wpin) [Entry date 02/10/03]
2/7/03	53	MEMORANDUM by Christophe Roche, Juanita Roche in support of [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche by Juanita Roche, Christophe Roche (wpin) [Entry date 02/10/03]

* * * * *

2/12/03	59	MOTION by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (wpin) [Entry date 02/13/03]

* * * * *

2/14/03	60	MEMORANDUM by Swib Investment Co in opposition to [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint (pwhi)

* * * * *

2/14/03	64	JOINT RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (stas) [Entry date 02/19/03]
2/14/03	65	TRANSCRIPT for the date of 11.15.03 before GBL (motions) (agil) [Entry date 02/19/03]
2/14/03	67	MEMORANDUM by Lincoln Property Co., Swib Investment Co in opposition to [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint (clar) [Entry date 02/19/03]

* * * * *

2/19/03	68	REPLY by Christophe Roche to response to [52-1] motion by Juanita Roche, Christopher Roche to Amend [28-1] amended complaint concerning punitive damages (large pleading) (clar)
2/20/03	69	REPLY by Christophe Roche, Juanita Roche to response to [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) (clar)
2/20/03	71	PROPOSED stipulated facts filed by plaintiff Christophe Roche, defendant Lincoln Property Co., defendant Swib Investment Co, plaintiff Juanita Roche (mcke) [Entry date 02/24/03]

* * * * *

2/21/03	--	Minute entry: Judge O'Grady. Reporter; Casamo and Assoc. Appearances; of counsel. Matter came on as Pltf's motion to amend amended complaint – Matter is argued and DENIED. Order to follow. (ntho) [Entry date 02/24/03] [Edit date 03/07/03]
2/21/03	--	Minute entry: (GBL) r: wilson. Appearances: Counsel. On for hearing on pltf motion to dismiss Count II re: Rule 41(a)(2) – argued and granted. Order to follow. (jsol) [Entry date 02/25/03]
2/21/03	75	Before the Court is Plaintiff's Motion for Leave to File a Second Amended Complaint. For the reasons staed [*sic*] from he bench, and in accord with specific

rulings thereto, it is hereby ordered – ORDER denying [52-1] motion by Juanita Roche, Christophe Roche to Amend [28-1] amended complaint by Juanita Roche, Christophe Roche (signed by Magistrate Judge Liam O'Grady) Copies Mailed: y [EOD Date: 2/26/03] (ntho) [Entry date 02/26/03]

* * * * *

3/10/03 91 ORDER for reasons stated in open court on 2/21/03, [59-1] motion by Juanita Roche, Christophe Roche to Voluntary Dismiss Count II pursuant to Rule 41(a)(2) is granted and Further Ordered that, should pltfs re-file a claim similar to Coutn [*sic*] II, they shall bear atty fees for all parties as to that count. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 3/13/03] (jsol) [Entry date 03/13/03]

* * * * *

3/13/03 95 MOTION by Juanita Roche, Christophe Roche for Summary Judgment (Hearing set for 4/4/03) (pwhi) [Entry date 03/17/03]

3/13/03 96 MOTION by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. and by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (pwhi) [Entry date 03/17/03]

3/13/03 97 MEMORANDUM of Law by Lincoln Property Co., Swib Investment Co in support of [96-1] motion by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D.

and [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (Large Pleading) (pwhi) [Entry date 03/17/03]

* * * * *

3/13/03 99 MOTION by Lincoln Property Co. for Summary Judgment (pwhi) [Entry date 03/17/03]

3/13/03 100 MEMORANDUM of Law by Lincoln Property Co. in support of [99-1] motion by Lincoln Property Co. for Summary Judgment (Large Pleading) (pwhi) [Entry date 03/17/03]

* * * * *

3/24/03 110 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [95-1] motion by Juanita Roche, Christophe Roche for Summary Judgment (clar) [Entry date 03/25/03]

3/24/03 111 MEMORANDUM of Law by Christophe Roche, Juanita Roche in opposition to [99-1] motion by Lincoln Property Co. for Summary Judgment (large pleading) (clar) [Entry date 03/25/03]

3/24/03 112 MEMORANDUM of Law by Christophe Roche, Juanita Roche in support of [111-1] their opposition to defts' motion to bar testimony by Richard Bernstein, M.D. and for summary judgment on all claims for personal injury (clar) [Entry date 03/25/03]

* * * * *

3/27/03 116 Rebuttal by Christophe Roche, Juanita Roche to response to [95-1] motion by

Juanita Roche, Christophe Roche for Judgment (large pleading) (clar) [Entry date 03/28/03]

3/27/03 117 Errata sheet correcting typographical and possibley [*sic*] illegible materials contained in the exibitis filed by plaintiff Christophe Roche, plaintiff Juanita Roche in Re: [111-1] opposition to motion for summary judgment (clar) [Entry date 03/28/03]

3/28/03 118 REPLY MEMORANDUM in support by Lincoln Property Co., Swib Investment Co of [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury (large pleading) (clar)

3/28/03 119 REPLY brief in support by Lincoln Property Co., Swib Investment Co of [96-1] motion by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. (large pleading) (clar)

* * * * *

4/3/03 128 MOTION by Swib Investment Co, Lincoln Property Co. for Leave to File a Surreply to pltf's rebuttal to defts' opposition to pltf's motion for summary judgment (mcke)

4/4/03 -- Minute entry: (GBL) r: Wilson. Appearances: Counsel. On for hearing on motions for SJ – all argued and under advisement. (jsol) [Entry date 04/08/03]

* * * * *

4/16/03 139 ORDER for reasons to be stated in the forthcoming Memo Order, [96-1] motion

by Swib Investment Co, Lincoln Property Co. to Bar Testimony by Richard Bernstein, M.D. is granted. [96-2] motion by Swib Investment Co, Lincoln Property Co. for Summary Judgment on All Claims for Personal Injury, [99-1] motion by Lincoln Property Co. for Summary Judgment is granted and [95-1] motion by Juanita Roche, Christophe Roche for Summary Judgment is denied. This case is removed from the trial docket and the statute of limitations for appeal is tolled until the Court enteres [*sic*] its forthcoming Memo Order and Judgment. This Order does not constitute a "judgment". (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 4/22/03] (jsol) [Entry date 04/22/03]

4/22/03 140 MOTION by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar) [Entry date 04/23/03]

* * * * *

4/22/03 142 MEMORANDUM by Christophe Roche, Juanita Roche in support of [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (large pleading) (clar) [Entry date 04/23/03]

4/30/03 143 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar)

4/30/03 144 Addendum filed by plaintiff Christophe Roche to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (clar)

* * * * *

5/2/03	145	BRIEF by Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (mcke)
5/2/03	146	MOTION by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (told to notice) (mcke) [Entry date 05/05/03]
5/5/03	147	SUPPLEMENTAL brief by Swib Investment Co in opposition to [140-1] motion by Juanita Roche, Christophe Roche to Remand pursuant to 28 USC 1447(c) (mcke)
5/6/03	148	Reply by Christophe Roche, Lincoln Property Co. to [147-1] supplemental brief opposing remand by Swib Investment Co (mcke) [Entry date 05/07/03]
5/8/03	149	OPPOSITION by Lincoln Property Co. to [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (mcke)

* * * * *

5/9/03	151	REPLY by Christophe Roche, Juanita Roche to response to [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (large pleading) (clar) [Entry date 05/12/03]

* * * * *

5/22/03	154	MOTION by Swib Investment Cofor Leave to File supplement brief (kjon)
5/22/03	155	SUPPLEMENTAL BRIEF by Swib Investment Co opposing [146-1] motion by Juanita Roche, Christophe Roche for rule 60(b) relief from an order or judgment that is void (kjon) [Entry date 05/27/03]

6/13/03	156	MOTION by Lincoln Property Co., Christophe Roche for Leave to File supplemental brief (mcke) [Entry date 06/16/03]
6/24/03	157	OPPOSITION by Lincoln Property Co., Swib Investment Co to pltfs "supplemental" motion to remand (there was no supplemental motion to remand filed) (mcke) [Entry date 06/25/03]

* * * * *

7/25/03	161	MEMORANDUM OPINION (signed by Judge Gerald B. Lee) Copies Mailed: y (agil) [Entry date 07/28/03]
7/25/03	162	ORDER, for the reasons stated in the Memorandum Opinion, that Dfts. Lincoln Property Company's and the state of Wisconsin Investment Board's, Motion to Bar the Testimony of Richard Bernstein, M.D., are GRANTED. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 7/28/03] (agil) [Entry date 07/28/03]
7/25/03	163	MEMORANDUM ORDER that Dft's, Lincoln Property Company's and the Stae [*sic*] of Wisconsin Investment Board Investment Company's, Motion for Summary Judgment are GRANTED as to all counts; that Christophe and Juanita Roche's, Motion for Summary Judgment is DENIED. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 7/28/03] (agil) [Entry date 07/28/03]
7/25/03	164	JUDGMENT is entered in favor of Dft's Lincoln Property Co., Swib Investment Co and against Pltfs Christophe Roche,

Juanita Roche (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD DATE: 7/28/03] (agil) [Entry date 07/28/03]

7/25/03 165 JUDGMENT for Lincoln Property Co., Swib Investment Co against Christophe Roche, Juanita Roche (entered by the clerk pursuant to the Courts order dated 7/25/03) Copies Mailed: 7/30/03 [EOD DATE: 7/30/03] (agil) [Entry date 07/30/03]

7/25/03 -- Case closed (agil) [Entry date 07/30/03]

8/4/03 166 MOTION by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment, by Juanita Roche, Christophe Roche for New Trial (will notice) (mcke) [Entry date 08/05/03]

* * * * *

8/11/03 170 MEMORANDUM ORDER that pltf's motoin [*sic*] to remand pursuant to 28 U.S.C. 1447(c) is DENIED. It is further ORDERED that pltfs motion for rule 60(b) relief from an order of judgment that is Void is DENIED. (signed by Judge Gerald B. Lee) Copies Mailed: yes [EOD Date: 8/12/03] (mcke) [Entry date 08/12/03]

* * * * *

8/18/03 171 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [166-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment and granting new trial (stas)

8/20/03 175 MOTION by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (clar) [Entry date 08/21/03]

* * * * *

8/21/03 178 NOTICE OF APPEAL OF [164-1] judgment order dated 7/25/03, [165-1] judgment order dated 7/25/03 by Christophe Roche, Juanita Roche. FILING FEE $105.00 RECEIPT # 165944. Copy of notice, judgments, memoradnum [*sic*] order, docket sheet & transmittal sheet sent to USCA. Copies sent to Christophe Roche, Lincoln Property Co., Swib Investment Co, Juanita Roche (mcke) [Entry date 08/26/03]

* * * * *

8/27/03 179 RESPONSE by Lincoln Property Co., Swib Investment Co in opposition to [175-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (jcup)

* * * * *

9/3/03 180 ORDER denying [166-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [163-1] order granting motion for summary judgment, denying [175-1] motion by Juanita Roche, Christophe Roche for Reconsideration of [170-1] the court's memorandum order of August 11, 2203 [*sic*] of pltfs' post-judgment motions (signed by Judge Gerald B. Lee)

		Copies Mailed: yes [EOD Date: 9/5/03] (mcke) [Entry date 09/05/03]
9/10/03	--	USCA Case Number Re: [178-1] appeal by plaintiffs CASE MANAGER: Mike Radday USCA NUMBER: 03-2064 (mcke) [Entry date 09/11/03]
10/17/03	--	Certification of completion sent to USCA re: [178-1] appeal by Juanita Roche, Christophe Roche (mcke)

* * * * *

7/1/04	183	Copy of Opinion of USCA re: [178-1] appeal by Juanita Roche, Christophe Roche Decided 06-30-2004 Reversed in part, vacated in part, and remanded for further proceedings as to the District Court decision; attached copy of judgment will not take effect until issuance of the mandate. (pmet) [Entry date 07/02/04] [Edit date 07/07/04]
7/28/04	184	USCA Order as to defendant Lincoln Property Co that the petition for rehearing and rehearing en banc is denied (kjon) [Entry date 07/29/04]
8/5/04	185	MOTION by Lincoln Property Co. for relief from mandate, and, in the alternative, by Lincoln Property Co. to present new evidence (stas) [Entry date 08/06/04]
8/5/04	186	MEMORANDUM by Lincoln Property Co. in support of [185-1] motion by Lincoln Property Co. for relief from mandate and, in the alternative, [185-2] motion by Lincoln Property Co. to present new evidence (LARGE PLEADING) (stas) [Entry date 08/06/04]

* * * * *

8/11/04	189	MEMORANDUM by Christophe Roche, Juanita Roche in opposition to [185-1] motion by Lincoln Property Co. for relief from mandate, [185-2] motion by Lincoln Property Co. to present new evidence (large pleading) (jcup) [Edit date 08/11/04]

* * * * *

8/16/04	191	Copy of Opinion of USCA re: [178-1] appeal by Juanita Roche, Christophe Roche Decided 06-30-2004 Reverses in part and Vacates in part the District Court decision. This case is remanded to the District Court for further proceedings consistent with the Court's opinion; attached copy of judgment will not take effect until issuance of the mandate. (pmet)
8/17/04	192	REPLY MEMORANDUM in support by Lincoln Property Co. of [185-1] motion by Lincoln Property Co. for relief from mandate, [185-2] motion by Lincoln Property Co. to present new evidence (clar)
8/19/04	193	MOTIÓN by Juanita Roche, Christophe Roche for Leave to File Surrebuttle Memo (to defts' Reply in Support to Motion for Relief from Mandate) (jsol)
8/20/04	--	Minute entry: (GBL) r: Wilson. Appearamces [*sic*]: Counsel. On for hearing on deft motion for relief from mandate/ present new evidence – argued and case is remanded back to Fx Co Circuit Court. Order to follow. (jsol)
8/23/04	194	ORDER for reasons stated in open court on 8/20/04, [185-1] motion for relief from mandate, and [185-2] motion by Lincoln Property Co. to present new evidence is

denied. (signed by Judge Gerald B. Lee) Copies Mailed: y [EOD Date: 8/25/04] (jsol) [Entry date 08/25/04]

* * * * *

12/9/04 -- USCA Letter: We have received notice from the Supreme Court that a petition for writ of certiorari has been filed in this case (kjon)

* * * * *

3/7/05 208 Letter to court from USCA re: a supreme court order was filed on 2/28/05 granting certiorari. (this letter goes with the notice of appeal that was filed on 8/21/03, USCA # 03-2064) (mcke) [Entry date 03/08/05]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees,

AND

INVESCO INSTITUTIONAL,
Defendant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/5/03	Docketing statement filed by Appellant Christopher Roche, Appellant Juanita Roche [3859052-1]. T/S needed [Y/N]: n. T/S already on file?: n/a. [03-2064] ~ [3859052] (mr)
9/9/03	Civil case docketed. (mr)
9/9/03	Docketing notice issued. [03-2064] ~ [3851210] (mr)
	* * * * *
11/19/03	Brief and joint appendix filed by Appellant Christopher Roche, Appellant Juanita Roche. Copies of brief: 8. # brf pages: 56. Sufficient[Y/N]?: y. SEALED vol. [Y/N]?: n. Copies of apx: 6 copies each of vols. 1-5. # apx pages: 1064. 2-sided copying[Y/N]?: y. Method of filing w/court: HD. Date of Service on parties: 11/19/03.

Type of service on parties: PM. Appellee brief due 12/22/03 for Swib Investment Co, for Lincoln Property Co. [03-2064] ~ [3889637] (mr)

12/22/03 Brief filed by Appellee Lincoln Property Co, Appellee Swib Investment Co. Copies of brief: 8. # brf pages: 69. Sufficient [Y/N]?: y. SEALED?[Y/N]: n. Method of filing w/ court: HD. Date of Service on parties: 12/22/03. Type of service on parties: PM. [03-2064] ~ [3906543] (mr)

* * * * *

12/23/03 Supplemental joint appendix filed by Appellee Lincoln Property Co, Appellee Swib Investment Co. per 12/23/03 order. Copies of apx: 5 copies each of sup jt.apx vols. 1, 2. # apx pages: 623. Sufficient? [Y/N]: y. SEALED vol.[Y/N]?: n. [03-2064] ~ [3906568] (mr)

1/8/04 Reply brief filed by Appellant Christopher Roche, Appellant Juanita Roche. Copies of brief: 8. # brf pages: 35. Sufficient [Y/N]?: y. SEALED[Y/N]?: n. Method of filing w/ court: HD. Date of Service on parties: 1/8/04. Type of service on parties: PM. [03-2064] ~ [3913751] (mr)

1/27/04 Motion with memorandum in support of the motion filed by Appellee Lincoln Property Co, Appellee Swib Investment Co to strike reply brief brief [3922630-1]. [03-2064] ~ [3922630] (dad)

1/27/04 Response/answer requested to motion to strike brief [3922630-1] Response/answer due 2/9/04 for Juanita Roche, for Christopher Roche. [03-2064] ~ [3922761] (ta)

2/10/04 Response/answer filed [3931401-1] by Appellant Christopher Roche, Appellant Juanita Roche to motion to strike brief [3922630-1]. [03-2064] ~ [3931401] (mr)

2/11/04 ORDER FILED [3931908] deferring action on motion to strike brief pending assignment of this case to a panel for review along with the merits of this case [3922630-1]. Copies to all parties. [03-2064] ~ [3931908] (mr)

2/12/04 Response/answer filed by Appellant Christopher Roche, Appellant Juanita Roche amending response/answer [3931401-1] [3932803-1]. [03-2064] (mr)

* * * * *

2/23/04 Reply filed by Appellee Lincoln Property Co, Appellee Swib Investment Co to response/answer [3931401-1]. [3938003-1] 03-2064] ~ [3938003] (mr)

* * * * *

5/5/04 Oral argument heard. Panel: Honorable H. E. Widener, Honorable Roger L. Gregory, Honorable C. A. Beam. Courtroom Deputy: SCC. [03-2064] (carr)

6/30/04 Published, authored opinion filed. Copies to all parties. [03-2064] (mr)

6/30/04 Informal action taken mooting motion to strike brief [3922630-1]. [03-2064] ~ [4008963] (mr)

6/30/04 Judgment order filed. Decision: reversed in part, vacated in part, and remanded. EOD Date: 6/30/04. [03-2064] ~ [4008965] (mr)

* * * * *

7/14/04	Petition filed by Appellee Swib Investment Co, Appellee Lincoln Property Co for rehearing [4016031-1], for rehearing en banc. Number of copies filed: original + 19 [4016031-2]. [03-2064] ~ [4016031] (mr)
	* * * * *
7/27/04	COURT ORDER filed [4023030] denying motion for rehearing [4016031-1], denying motion for rehearing en banc [4016031-2]. EOD Date: 7/27/04. Copies to all parties. ~ [4023030] [03-2064] (mr)
	* * * * *
7/30/04	Motion filed by Appellee Swib Investment Co, Appellee Lincoln Property Co to stay the mandate [4026195-1]. [03-2064] ~ [4026195] (mr)
8/4/04	COURT ORDER filed [4028607] denying motion to stay mandate [4026195-1]. Copies to all parties. ~ [4028607] [03-2064] (mr)
	* * * * *
8/12/04	Mandate issued. ~ [4032849] [03-2064] (dad)
12/7/04	Supreme Court notice that petition for certiorari was filed on 11/24/04. Spct No.: 04-712 Spct Pty 1: Lincoln Property Co., et al Spct Pty 2: Christopher Roche, et al. [03-2064] ~ [4098100] (mst)
3/4/05	Supreme Court order received granting petition certiorari [4098100-1] on 02/28/05. [03-2064] ~ [4145957] (dhb)

[seal omitted] COMMONWEALTH OF VIRGINIA [seal omitted]

Circuit Court of Fairfax County

4110 Chain Bridge Road
Fairfax, Virginia 22030
703-246-4358

To: LINCOLN PROPERTY CO
T/A LINCOLN PROP CO ECW INC
SERVE R/A CMWTH LEGAL SVC CORP
4701 COX RD SUITE 301
GLEN ALLEN, VA

NOTICE OF MOTION FOR JUDGMENT

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 26th day of Aug 2002.

Law No. L206874

John T. Frey, Clerk

By: /s/ JANET L. [illegible]
Deputy Clerk

PHILLIPS, JERRY M. P.Q.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTOPHE ROCHE,
Plaintiff

v. LAW NO 206874

LINCOLN PROPERTY COMPANY
T/A LINCOLN PROPERTY COMPANY ECW, INC.,
Agent
3500 Lincoln Plaza
500 North Akard Street, Suite 3300
Dallas, Texas 72501,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
INVESCO INSTITUTIONAL (N/A, INC.)
INSTITUTIONAL DIVISION OF AMVESCAP
A/K/A INVESCO REALTY ADVISORS,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
SWIB INVESTMENT COMPANY
STATE OF WISCONSIN INVESTMENT BOARD
LINCOLN PROPERTY COMPANY
1155 Herndon Parkway
Herndon, Virginia
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, Christophe Roche, by counsel, and respectfully motions the Court for Judgment against the defendants, for the following reasons

1. Plaintiff, Christophe Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln")].

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. Defendant, INVESCO, an institutional division of AMVESCAP, is an investment management group. Upon information and belief, INVESCO, for all relevant

purposes arid times related to this complaint, traded by and through "INVESCO Realty Advisors."

7. INVESCO Realty Advisors, through its wholly owned and/or sponsored investment affiliate and/or subsidiary, SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB")].

8. Upon information and belief, defendant/owner as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale in 2002, will determine if additional defendant or defendants will be named.

9. Upon information and belief, defendant/owner, as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

10. Plaintiff, Christophe Roche, [hereinafter referred to as ("Roche")], and Juanita Castillo (Roche), signed a Lease with the owner, believed to be "SWIB" or "INVESCO" and Lincoln Property for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment"), which Lease is in the possession of the Defendant Lincoln. [Roche has made request for copies of this Lease from the landlord. His only copy of this Lease

was taken and/or lost by the landlord during a forced "move out" described below. As of the date of filing, the lease has not been provided, even though it has been requested in person and in writing.]

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. All the defendants are engaged in the real estate investment and/or property management business and trade under the various names listed above.

13. The defendants, at the time of the occurrence in question, and upon information and belief, currently own and operate Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and his family leased an apartment in the complex (Unit 104) from the defendants, as described above, under the terms of the Lease.

15. Roche was a resident/tenant at Westfield Village during all relevant times and for many months before he started a six-week employment with Lincoln Property, and gave numerous notifications of the problems that are described below.

16. Lincoln breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they

"provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy.

20. Due to the failures and breach of its duties, as described below, Roche and his family, including his six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire building. Through research, the pipes were known to

rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment;

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute a common law and/or statutory negligence that proximately caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and his family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and his family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the alternative, in the event the plaintiff is unable to prove specific

acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment in question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question, which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of the defendants, Mr. Roche has suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, lesions on his body, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. Roche and his family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and his family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, Roche developed physical symptoms of cough, sore throat, and skin lesions; and neurological deficits which permanently have weakened his concentration and brain processing capabilities. Juanita Roche was injured by the toxic exposure to the extent that she suffers significant short-term auditory concentration and cognitive difficulties, and has been diagnosed with Adjustment Disorder with depression and anxiety.

30. Roche is 32 years old and his wife Juanita, 23 years old, a pre-school teacher, were in general good health.

31. The Roche family, including his 11 year old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed in another property owned by Lincoln on a temporary basis. **That property also was contaminated with toxic mold.** The temporary property within The Village at Potomac Falls, was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet Roche noticed the room was infiltrated with the

same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Roche to stay back from the mold and not to breathe it and stated "Don't get near it, its [*sic*] bad news, it can cause pneumonia and other bad stuff".

34. The Roche family was temporarily moved to the Village at Potomac Falls, also managed by Lincoln. The family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The family was displaced from March 10, 2002, to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments, now known as Rosslyn Heights, located in Arlington, Virginia. Moisture problems in the

apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test, Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, are more likely than not, suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception process continued, as described above. Vernon Tatem approached Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a

Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Mariba and Tatum felt their jobs would be in jeopardy if they mentioned anything about the mold. Within three days of Roche filing the grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Mariba was terminated. The carpet contractor who warned Roche about the mold was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village, now known as Rosslyn Heights, where the units there were classified into 5 different levels of hazardous exposure. But the Lincoln maintenance staff were never advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Roche was employed by Lincoln in December of 2001.

42. As a result of Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not know that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be

stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext, even though the matter was subject to an employment arbitration clause in Mr. Roche's employment contract. Prior to firing him on August 16, 2002, Lincoln breached that arbitration agreement by refusing to conduct the hearing before the American Arbitration Association in accordance with AAA regulations. (The rules of AAA required Lincoln to file their arbitration agreement with AAA on a yearly basis. By not filing annually, AAA required that the hearing be conducted under the Employment Arbitration Rules; Lincoln denied that, demanding that the matter be subjected to the Commercial Arbitration Rules.)

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described further below.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Roche's health.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in

personal property loss, including their automobile, and does not even include the sentimental loss of such things as wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimential [*sic*] stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. Roche has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat his injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to Roche are permanent and debilitating. Roche and his family have been placed on daily medication, in the past and for the future, to treat lungs, skill disorders, memory loss, and emotional distress caused by living out of suitcases and by destroying Mr. Roche's employment/career rights with Lincoln.

50. All of the above allegations are relevant to all the below Counts, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

(Consider each Count below as having incorporated by reference all of the above paragraphs.)

COUNT I

(Negligence ~ *Per se*)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

52. The defendants had a duty to maintain the Roche apartment with due care in accordance with their duties

as a landlord, and in accordance with the Virginia Landlord Tenant Act, and under industry standards, and to use due care and skill necessary to meet the standards of the landlord.

53. The defendants breached the aforementioned duty and was negligence [*sic*] in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendants' negligence, the plaintiff has suffered damages to their property and their person, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest.

COUNT II

(Breach of Lease)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

59. Pursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such a poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its [*sic*] promises to Roche to repair the defects, through its advertisements and inducements, the defendants committed themselves to honor its [*sic*] warranty obligations in the Lease and by common law.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendants breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendants of the defective condition of the apartment and the breaches of the express warranties, but the defendants have failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its [*sic*] failure to repair or replace the aforementioned defects in a timely manner, the defendants breached their continuing duty to repair under the Lease, under the common law, and under the applicable Building Codes. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendants' breach of its express warranty, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

67. By operation of law, the defendants impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

68. Further, through its promotional literature and other representations, defendants impliedly warranted to Roche that the apartment was free from substantial defects and was constructed in a workmanlike manner in accordance with the standard of workmanlike quality prevailing at the time and place of construction, and specifically at the time that the Lease was entered into.

69. Defendants breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of the defendants, but no action was taken to correct the same.

71. By reason of defendants' breach of its implied warranties, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Breach of Contract)

72. Plaintiff incorporates herein by reference Paragraphs 1 through 71 above.

73. Plaintiff was informed on or about the seventh of March, 2002 that the apartment was experiencing significant mold damage as a direct result of water intrusion damage found at the heating and air conditioning closet, the front master bath, the front entrance hall coat closet, the washer and dryer room/pantry. This water intrusion and water was damaging not only the person of Mr. Roche but his pet, children, and wife.

74. As stated herein, plaintiff's apartment contained numerous latent defects of which Roche had no knowledge until receiving the Toxic Mold Report, and that the apartment did not adequately perform the function for which it was intended and was not free from the defects described.

75. Roche informed defendants of the defects as listed in his letter.

76. Defendants agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition.

77. Roche accepted the defendants' offer to remediate, but defendants refused to give the assurance that the apartment would be free from the toxic mold condition.

78. On numerous occasions, Roche tried to schedule repairs but was met with resistence [*sic*].

79. The defendants breached its contract in failing to perform the necessary remedial activities to correct the defects in a timely manner.

80. The defendant materially breached the contract with the plaintiff in the particulars previously described.

81. As a direct, foreseeable and proximate result of defendants' material breach of contract, Roche has suffered

actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial. These damages include, but are not limited to the following:

a. The cost to replace all of their damaged personal property and all the personal goods and belongings;

b. The out-of-pocket expenditures incurred by the Roche family;

c. The cost of experts and consultants required to determine the extent and severity of the problems with the plaintiff's apartment, automobile and personal property;

d. Reasonable attorney's fees, as allowed by law;

e. Diminution in value of Roche's property; and

f. Other damages, including special and exemplary damages, such as loss interest and other damages to be shown at the trial of this action.

COUNT V

(Actual Fraud/Intentional Misrepresentation)

82. Plaintiff incorporates by reference Paragraphs 1 through 81 above.

83. Through its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained.

84. Defendant Lincoln's statements referenced in the above paragraph, that the apartment was of high quality and there was prompt attention for emergency maintenance service, was false.

85. Defendants intentionally misrepresented these material facts, or made them with reckless abandon and disregard for the truth, and intended the Roche family and subsequent purchasers of apartments to rely on them in their leasing of the apartments at Westfield Village.

86. Defendants [*sic*] actions were done in willful and wanton disregard of Roche's rights.

87. Roche reasonably and justifiably relied upon the defendants' false and misleading representations of material facts, all to Roche's detriment.

88. As a direct result of defendants' actual fraud, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees, and punitive damages to the statutory limit provided.

COUNT VI

(Constructive Fraud/Negligent Misrepresentation)

89. Plaintiff incorporates herein by reference Paragraphs 1 though 88 above.

90. At the time the defendants made such false representations described above, defendants should have known of the inherent defects with the pipes, moisture leakage, unrepaired inherent defects, and should have disclosed such in its literature, which was ultimately and foreseeably distributed to Roche. Defendants failed to disclose such defects to Roche.

91. Defendants innocently or negligently misrepresented these material facts and intended the Roche family and subsequent lessees, such as Roche, to rely on them in their leasing of apartments.

92. Roche reasonably and justifiably relied upon defendants' false and misleading representations of material facts, to Roche's detriment.

93. As a direct result of defendants' constructive fraud, Roche has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees.

COUNT VII – CONSUMER FRAUD/ TREBLING OF DAMAGES

(Violation of Virginia Consumer Protection Act)

94. Plaintiff incorporates herein by reference Paragraphs 1 through 92 above.

95. The aforementioned acts by the defendants constitutes [*sic*] prohibitive practices within the meaning of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200.

96. As set forth in the paragraphs above, defendants violated the Virginia Consumer Protection Act by making statements and omissions, including, but not limited to:

a. Stating that the apartment was habitable and of high quality and would be promptly maintained upon notification of defects;

b. Omitting that they knew they had inherently defective piping systems, and moisture intrusion in existence, even though it had a policy and knowledge from its management and ownership of Summit Village, as described above, during the relevant time, and knew of the dangerousness, but yet it failed to disclose the same;

c. Advertising or offering for lease apartments that were defective, without clearly and unequivocally indicating in the advertisements or offers of lease, that the apartments were subject to the problems indicated above;

d. Misrepresenting the quality of their service and management in response to complaint or notification of defects;

e. Misrepresenting that the defendants' services were of a particular quality or standard;

f. Advertising goods or services with the intent not to honor their claims, as advertised, namely, that they would give high quality maintenance, service and habitable and high quality apartment premises, and that the premises were of a first class building quality;

g. Offering for lease defective goods;

h. Using deception, fraud, false pretense, false promise and/or misrepresentation in connection with a consumer transaction.

97. The foregoing violations of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200, *et seq.*,

were willful, and consequently support trebled damages, as contemplated under the Virginia Act.

98. Pursuant to Virginia Code Section 59.1-204(B), Roche is entitled to an award of reasonable attorney's fees and court costs.

99. As a direct and proximate result of defendants' misconduct in violation of the Virginia Consumer Protection Act, Roche has suffered actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or, according to proof at trial, including trebled damages as authorized by statute, plus interest and attorney's fees.

COUNT VIII – FALSE ADVERTISING

(Violation of Virginia Code Section 18.2-216)

100. Plaintiff incorporates herein by reference Paragraphs 1 through 99 above.

101. With the intent to lease or increase the consumption thereof by the public, and in violation of Virginia Code Section 18.2-216, the defendants published, disseminated, circulated before the public and potential consumers, including Roche, advertising information concerning the performance and characteristics of its services and apartments, which were untrue, deceptive and misleading, so as to induce the public in general, and Roche in particular, to lease the premises. This includes ads in Apartment Shoppers Guide, Consumer Guides, and internet postings proclaiming the same misleading pronouncements described above.

102. Defendants' statements constitute violation of Virginia Code Section 182-216 [*sic*], as set forth in detail above.

103. Pursuant to Virginia Code Section 18.2-216, and 59.1-68.4, Roche is entitled to recover damages and reasonable attorney's fees due to defendants' foregoing violations.

104. As a direct and proximate result of defendants' foregoing violation, Roche has suffered actual damages in

the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest, attorney's fees and court costs.

COUNT IX

(Tortuous [*sic*] Interference With Contract by Improper Methods)

105. The allegations contained in Paragraphs 1 through 109 above are incorporated herein by reference as if fully set forth herein.

106. Defendant, Lincoln, maintains at-will employment contracts with all of its employees.

107. Lincoln, on numerous occasions, tortuously [*sic*] interfered with plaintiff's employment contract by using improper methods. Defendant Lincoln employed verbal and written attempts to discredit, defame and ostracize the plaintiff with the motive to terminate him from his employment by taking adverse actions against him.

108. Lincoln employed improper methods in its tortuous [*sic*] interference with Roche's employment contract by defrauding him and giving him false assurances that they would abide by their grievance procedure, which they have refused to honor. During the course of its fraudulent conduct, Lincoln did numerous acts to frustrate his employment status and obfuscate the grievance process.

109. Lincoln employed improper methods by use of its superior position as employer over Roche.

110. Lincoln abused this confidential relationship and superior position in an effort to destroy the employment and wage earning capacity of Roche, and did not act in good faith in addressing the grievance.

111. Roche requests compensatory damages, punitive damages, and attorney's fees, that the Court may deem appropriate, for the harm caused by Lincoln's tortuous [*sic*] interference.

COUNT X

(Conversion)

112. Plaintiff incorporates Paragraphs 1 through 116 herein as if fully set out.

113. Defendant converted the personal property of Roche in the manner described above, by dispossessing Roche from his property without his consent and against his interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

114. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Christopher Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of his personalty.

COUNT XI

(Intentional Infliction of Emotional Distress)

115. All above paragraphs are incorporated herein as if fully set out.

116. The defendants, jointly and severally, acted intentionally, or with such wanton disregard of the consequences of its actins [*sic*] to amount to a conscious disregard for the rights of others.

117. The defendants purposefully inflicted emotional distress, or intended the above-described conduct, and knew or should have known, that emotional distress would likely result.

118. This conduct described above was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.

119. The defendants' conduct was the proximate cause of Roche's emotional distress.

120. Because the acts were intentional and/or done with reckless disregard of the rights of others, punitive damages should be awarded to deter these defendants and others from similar conduct in the future.

WHEREFORE, the Plaintiff, Christopher Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury, plus punitive damages according to law.

COUNT XII

(Negligent Infliction of Emotional Distress)

121. All above paragraphs are incorporated by reference as if fully set out.

122. Plaintiff Roche has suffered physical manifestations of injury, including aggravation of body sores, stress, and neurological damage, as a result of the defendant's conduct.

123. These injuries were caused by defendant's negligence as described above.

WHEREFORE the Plaintiff, Christophe Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

CHRISTOPHE ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar No. 9211

[seal omitted] COMMONWEALTH OF VIRGINIA [seal omitted]

Circuit Court of Fairfax County

4110 Chain Bridge Road
Fairfax, Virginia 22030
703-246-4358

To: LINCOLN PROPERTY CO
T/A LINCOLN PROP CO ECW INC
SERVE R/A CMWTH LEGAL SVC CORP
4701 COX RD SUITE 301
GLEN ALLEN, VA

NOTICE OF MOTION FOR JUDGMENT

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 26th day of Aug 2002.

Law No. L206873

John T. Frey, Clerk

By: /s/ JANET L. [illegible]
Deputy Clerk

PHILLIPS, JERRY M. P.Q.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JUANITA ROCHE,
Plaintiff

v. LAW NO 206873

LINCOLN PROPERTY COMPANY
T/A LINCOLN PROPERTY COMPANY ECW, INC.,
Agent
3500 Lincoln Plaza
500 North Akard Street, Suite 3300
Dallas, Texas 72501,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
INVESCO INSTITUTIONAL (N/A, INC.)
INSTITUTIONAL DIVISION OF AMVESCAP
A/K/A INVESCO REALTY ADVISORS,
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

and
SWIB INVESTMENT COMPANY
STATE OF WISCONSIN INVESTMENT BOARD
LINCOLN PROPERTY COMPANY
1155 Herndon Parkway
Herndon, Virginia
Defendant

Serve: Registered Agent
Commonwealth Legal Services Corporation
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, Juanita Roche, by counsel, and respectfully motions the Court for Judgment against the defendants, for the following reasons:

1. Plaintiff, Juanita Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln")].

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. Defendant, INVESCO, an institutional division of AMVESCAP, is an investment management group. Upon information and belief, INVESCO, for all relevant

purposes and times related to this complaint, traded by and through "INVESCO Realty Advisors".

7. INVESCO Realty Advisors, through its wholly owned and/or sponsored investment affiliate and/or subsidiary, SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB")].

8. Upon information and belief, defendant/owner as described above, SWIB, by and through defendants INVESCO and Lincoln, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 5111 Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

9. Upon information and belief, INVESCO and/or Lincoln Property, jointly or severally, have transferred the management and ownership of Summit Village Apartments, now known as Rosslyn Heights, 1804 North Quinn Street, Arlington, Virginia, to Gates, Hudson Property Management, a business entity located in Fairfax, Virginia. Whether or not this new entity has assumed liabilities or is subject to these claims, will be determined by further discovery in this cause.

10. Plaintiff, Juanita Roche, [hereinafter referred to as ("Roche")], and Christophe Roche, signed a Lease with the owner believed to be SWIB or Invesco, and Lincoln Property for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment"), which Lease is in the possession of the Defendant Lincoln. [Roche has made requests for copies of this Lease from the landlord. Her only copy of this Lease was taken and/or lost by the landlord during a forced "move out" described below. As

of the date of filing, the lease has not been provided even though it has been requested by Roche and by written correspondence.]

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. All the defendants are engaged in the real estate investment and/or property management business and trade under the various names listed above.

13. The defendants, at the time of the occurrence in question, and upon information and belief, currently own and operate Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and her family leased an apartment in the complex (Unit 104) from the defendants, as described above, under the terms of the Lease.

15. Roche was a resident/tenant at Westfield Village during all relevant times and gave numerous notifications of the problems that are described below.

16. Lincoln breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his [*sic*] apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his [*sic*] apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded by the defendants.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they "provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had

advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy. The apartment brochure advertisement set out what the prospective tenants' expectations were under a heading "YOUR EXPECTATIONS," and stated, "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee, ..."

20. Due to the failures and breach of its duties, as described below, Roche and her family, including a six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire

building. Through research, the pipes were known to rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment;

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute [*sic*] a common law and/or statutory negligence that proximately, caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and her family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and her family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the

alternative, in the event the plaintiff is unable to prove specific acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment is question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question, which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of the defendants, Ms. Roche has suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. Roche and her family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and her family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, Ms. Roche developed physical symptoms of cough, sore throat, and neurological deficits which permanently have weakened her concentration and brain processing capabilities, and she has been diagnosed with Adjustment Disorder with depression and anxiety.

30. Roche is 23 years old pre-school teacher, and her husband, Christophe, 32 years old, were in general good health.

31. The Roche family, including their 6 year-old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed in another property owned by Lincoln on a temporary basis. **That property also was contaminated with toxic mold.** The temporary property within The Village at Potomac Falls, was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Mr. Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet, Mr. Roche noticed the room was infiltrated with the same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was

discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Mr. Roche to stay back from the mold and not breathe it and stated "Don't get near it, its [*sic*] bad news, it can cause pneumonia and other bad stuff".

34. The Roche family was temporarily moved to the Village at Potomac Falls, also managed by Lincoln. The family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The family was displaced from March 10, 2002, up and to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments (now known as Rosslyn Heights) located in Arlington, Virginia. Moisture problems in the apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test,

Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, are more likely than not, suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception process continued, as described above. Vernon Tatem approached Mr. Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Mr. Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Peter Mariba and Tatum felt their jobs would be in

jeopardy if they mentioned anything about the mold. Within three days of Mr. Roche filing a grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Peter Mariba, was terminated. The carpet contractor who warned Mr. Roche about the mold, was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village (now known as Rosslyn Heights), where the units there were classified into 5 different levels of hazardous exposure. But the defendants' maintenance staff were not advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Roche was employed by Lincoln in December of 2001.

42. As a result of Mr. Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not know that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The

Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext, even though the matter was subject to an employment arbitration clause in Mr. Roche's employment contract. Prior to firing him on August 16, 2002. Lincoln breached that arbitration agreement by refusing to conduct the hearing before the American Arbitration Association in accordance with AAA regulations. (The rules of AAA required Lincoln to file their arbitration agreement with AAA on a yearly basis. By not filing annually, AAA required that the hearing be conducted under the Employment Arbitration Rules; Lincoln denied that, demanding that the matter be subjected to the Commercial Arbitration Rules.)

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Ms. Roche's health.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in personal property loss, including their automobile, and does not even include the sentimental loss of such things as

wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimential [*sic*] stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. Roche has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat her injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to Roche are permanent and debilitating. Roche and her family have been placed on daily medication, in the past and for the future, to treat lungs, skill disorders, memory loss, and emotional distress caused by living out of suitcases and by destroying Mr. Roche's employment/career rights with Lincoln.

50. All of the above allegations are relevant to all the below Counts, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

(Consider each Count below as having incorporated by reference all of the above paragraphs.)

COUNT I

(Negligence ~ *Per se*)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

52. The defendants had a duty to maintain the Roche apartment with due care in accordance with their duties as a landlord, and in accordance with the Virginia Landlord Tenant Act, and under industry standards, and to

use due care and skill necessary to meet the standards of the landlord.

53. The defendants breached the aforementioned duty and was negligence [*sic*] in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement, the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendants' negligence, the plaintiff has suffered damages to their property and their person, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest.

COUNT II

(Breach of Lease)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

59. Pursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its promises to Roche to repair the defects, through its advertisements and inducements, the defendants committed themselves to honor its warranty obligations in the Lease and by common law.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendants breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendants of the defective condition of the apartment and the breaches of the express warranties, but the defendants have failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its failure to repair or replace the aforementioned defects in a timely manner, the defendants breached their continuing duty to repair under the Lease, under the common law, and under the applicable Building Codes. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendants' breach of its express warranty, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

67. By operation of law, the defendants impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

68. Further, through its promotional literature and other representations, defendants impliedly warranted to Roche that the apartment was free from substantial defects and was constructed in a workmanlike manner in accordance with the standard of workmanlike quality prevailing at the time and place of construction, and specifically at the time that the Lease was entered into.

69. Defendants breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of the defendants, but no action was taken to correct the same.

71. By reason of defendants' breach of its implied warranties, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Breach of Contract)

72. Plaintiff incorporates herein by reference Paragraphs 1 through 71 above.

73. Plaintiff was informed on or about the seventh of March, 2002 that the apartment was experiencing significant mold damage as a direct result of water intrusion damage found at the heating and air conditioning closet, the front master bath, the front entrance hall coat closet, the washer and dryer room/pantry. This water intrusion and water was damaging not only the person of Ms. Roche but her pet, children, and husband.

74. As stated herein, plaintiff's apartment contained numerous latent defects of which Roche had no knowledge until receiving the Toxic Mold Report, and that the apartment did not adequately perform the function for which it was intended and was not free from the defects described.

75. Roche informed defendants of the defects as listed in his letter.

76. Defendants agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition.

77. Roche accepted the defendants' offer to remediate, but defendants refused to give the assurance that the apartment would be free from the toxic mold condition.

78. On numerous occasions, Roche tried to schedule repairs but was met with resistance.

79. The defendants breached its contract in failing to perform the necessary remedial activities to correct the defects in a timely manner.

80. The defendant materially breached the contract with the plaintiff in the particulars previously described.

81. As a direct, foreseeable and proximate result of defendants' material breach of contract, Roche has suffered

actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00), plus interest, or according to proof at trial. These damages include, but are not limited to the following:

a. The cost to replace all of their damaged personal property and all the personal goods and belongings;

b. The out-of-pocket expenditures incurred by the Roche family;

c. The cost of experts and consultants required to determine the extent and severity of the problems with the plaintiff's apartment, automobile and personal property;

d. Reasonable attorney's fees, as allowed by law;

e. Diminuti n in value of Roche's property; and

f. Other damages, including special and exemplary damages, such as loss interest and other damages to be shown at the trial of this action.

COUNT V

(Actual Fraud/Intentional Misrepresentation)

82. Plaintiff incorporates by reference Paragraphs 1 through 81 above.

83. Through its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained.

84. Defendant Lincoln's statements referenced in the above paragraph, that the apartment was of high quality and there was prompt attention for emergency maintenance service, including the guarantee of 24-hour service, was false.

85. Defendants intentionally misrepresented these material facts, or made them with reckless abandon and disregard for the truth, and intended the Roche family and subsequent tenants of apartments to rely on them in their leasing of the apartments at Westfield Village.

86. Defendants [*sic*] actions were done in wilful and wanton disregard of Roche's rights.

87. Roche reasonably and justifiably relied upon the defendants' false and misleading representations of material facts, all to Roche's detriment.

88. As a direct result of defendants' actual fraud, plaintiff has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees, and punitive damages to the statutory limit provided.

COUNT VI

(Constructive Fraud/Negligent Misrepresentation)

89. Plaintiff incorporates herein by reference Paragraphs 1 though 88 above.

90. At the time the defendants made such false representations described above, defendants should have known of the inherent defects with the pipes, moisture leakage, unrepaired inherent defects, and should have disclosed such in its literature, which was ultimately and foreseeably distributed to Roche. Defendants failed to disclose such defects to Roche.

91. Defendants innocently or negligently misrepresented these material facts and intended the Roche family and subsequent lessees, such as Roche, to rely on them in their leasing of apartments.

92. Roche reasonably and justifiably relied upon defendants' false and misleading representations of material facts, to Roche's detriment.

93. As a direct result of defendants' constructive fraud, Roche has suffered damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or according to proof at trial, plus interest and attorney's fees.

COUNT VII - CONSUMER FRAUD/ TREBLING OF DAMAGES

(Violation of Virginia Consumer Protection Act)

94. Plaintiff incorporates herein by reference Paragraphs 1 through 92 above.

95. The aforementioned acts by the defendants constitutes [*sic*] prohibitive practices within the meaning of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200.

96. As set forth in the paragraphs above, defendants violated the Virginia Consumer Protection Act by making statements and omissions, including, but not limited to:

a. Stating that the apartment was habitable and of high quality and would be promptly maintained upon notification of defects;

b. Omitting that they knew they had inherently defective piping systems, and moisture intrusion in existence, even though it had a policy and knowledge from its management and ownership of Summit Village, as described above, during the relevant time, and knew of the dangerousness, but yet it failed to disclose the same;

c. Advertising or offering for lease apartments that were defective, without clearly and unequivocally indicating in the advertisements or offers of lease, that the apartments were subject to the problems indicated above;

d. Misrepresenting the quality of their service and management in response to complaint or notification of defects;

e. Misrepresenting that the defendants' services were of a particular quality or standard;

f. Advertising goods or services with the intent not to honor their claims, as advertised, namely, that they would give high quality maintenance, service and habitable and high quality apartment premises, and that the premises were of a first class building quality;

g. Offering for lease defective goods;

h. Using deception, fraud, false pretense, false promise and/or misrepresentation in connection with a consumer transaction.

97. The foregoing violations of the Virginia Consumer Protection Act, Virginia Code Section 59.1-200, *et seq.*,

were willful, and consequently support trebled damages, as contemplated under the Virginia Act.

98. Pursuant to Virginia Code Section 59.1-204(B), Roche is entitled to an award of reasonable attorney's fees and court costs.

99. As a direct and proximate result of defendants' misconduct in violation of the Virginia Consumer Protection Act, Roche has suffered actual damages in the amount of Ten Million and no/100 Dollars ($10,000,000.00) or, according to proof at trial, including trebled damages as authorized by statute plus interest and attorney's fees.

COUNT VIII – FALSE ADVERTISING

(Violation of Virginia Code Section 18.2-216)

100. Plaintiff incorporates herein by reference Paragraphs 1 through 99 above.

101. With the intent to lease or increase the consumption thereof by the public, and in violation of Virginia Code Section 18.2-216, the defendants published, disseminated, circulated before the public and potential consumers, including Roche, advertising information concerning the performance and characteristics of its services and apartments, which were untrue, deceptive and misleading, so as to induce the public in general, and Roche in particular, to lease the premises. This includes ads in Apartment Shoppers Guide, Consumer Guides, and internet postings proclaiming the same misleading pronouncements described above.

102. Defendants' statements constitute violation of Virginia Code Section 18.2-216, as set forth in detail above.

103. Pursuant to Virginia Code Section 18.2-216, and 59.1-68.3, Roche is entitled to recover damages and reasonable attorney's fees due to defendants' foregoing violations.

104. As a direct and proximate result of defendants' foregoing violation, Roche has suffered actual damages in

the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest, attorney's fees and court costs.

COUNT IX

(Conversion)

105. Plaintiff incorporates Paragraphs 1 through 104 herein as if fully set out.

106. Defendant converted the personal property of Roche in the manner described above, by dispossessing Roche from her property without her consent and against her interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

107. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Juanita Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of her personalty.

COUNT X

(Intentional Infliction of Emotional Distress)

108. All above paragraphs are incorporated herein as if fully set out.

109. The defendants, jointly and severally, acted intentionally, or with such wanton disregard of the consequences of its action to amount to a conscious disregard for the rights of others.

110. The defendants purposefully inflicted emotional distress, or intended the above described conduct, and knew or should have known, that emotional distress would likely result.

111. This conduct described above was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.

112. The defendants' conduct was the proximate cause of Roche's emotional distress.

113. Because the acts were intentional and/or done with reckless disregard of the rights of others, punitive damages should be awarded to deter these defendants and others from similar conduct in the future.

WHEREFORE, the Plaintiff, Juanita Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury, plus punitive damages according to law.

COUNT XI

(Negligent Infliction of Emotional Distress)

114. All above paragraphs are incorporated by reference as if fully set out.

115. Plaintiff Roche has suffered physical manifestations of injury, including aggravation of depression, anxiety, and neurological damage, as a result of the defendant's conduct.

116. These injuries were caused by defendant's negligence as described above.

WHEREFORE the Plaintiff, Juanita Roche, motions the court for judgment in the amount of Ten Million Dollars ($10,000,000.00), plus interest from the date of injury.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

JUANITA ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Sept. 17, 2002]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendants Lincoln Property Co. ("Lincoln"), INVESCO institutional ("INVESCO") and the State of Wisconsin Investment Board Investment Co. ("SWIB") (collectively referred to herein as "Defendants"), hereby remove to this Court a civil lawsuit filed by Christophe Roche in the Circuit Court of Fairfax County, Law No. 206874. Without admitting any of the allegations of the Complaint, Defendants' grounds for removing this action are as follows:

1. On or about August 22, 2002, Plaintiff filed a twelve-count Complaint against Defendants in the Circuit Court of Fairfax County (the "State Complaint").

2. In the State Complaint, Plaintiff alleges negligence per se (Count I), breach of lease (Count II), breach of implied warranties (Count III), breach of contract (Count IV), actual fraud/intentional misrepresentation (Count V), constructive fraud/negligent misrepresentation (Count VI), consumer fraud (Count VII), false advertising (Count VIII), tortious interference with contract by improper

methods (Count IX), conversion (Count X), intentional infliction of emotional distress (Count XI), and negligent infliction of emotional distress (Count XII). Plaintiff seeks compensatory damages and punitive damages of $100 million.

3. On August 30, 2002, Plaintiff's State Complaint was served (together with a summons) upon Defendants. See Ex. 1.[1] No other pleadings have been filed with the Circuit Court of Fairfax County.

4. This action is removable because if [*sic*] falls within the original diversity jurisdiction of this Court under 28 U.S.C. §§ 1332 and 1441(a). According to his Complaint, Plaintiff is a citizen of and is domiciled in the Commonwealth of Virginia.

5. Lincoln is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, Lincoln is a Texas corporation with its principal place of business in Texas.

6. INVESCO is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, INVESCO is a Delaware corporation with its principal place of business in Georgia.

7. SWIB is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen.

8. Therefore, this case is removable by reason of diversity of citizenship because the amount in controversy is more than $75,000, exclusive of interest and costs, the parties are of diverse citizenship, and none of the

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[1] Exhibit 1, in accordance with 28 U.S.C. § 1446(a), includes all process, pleadings, papers, and Orders which have been served upon Defendants in the state court lawsuit that is being removed.

Defendants is a citizen or resident of the Commonwealth of Virginia. Accordingly, this Court has jurisdiction to hear the subject matter of this action pursuant to 28 U.S.C. § 1332.

9. The United States District Court for the Eastern District of Virginia, Alexandria Division, is the proper venue for the action pursuant to 28 U.S.C. § 1441(a), because it is "the district court of the United States for the district and division embracing the place where such action is pending."

10. All Defendants have joined in the removal of this matter from the Circuit Court of Fairfax County to the United States District Court for the Eastern District of Virginia, Alexandria Division.

11. This notice of removal has been timely filed within 30 days after the earliest service of a summons and complaint. See Murphy Brothers, Inc. v. Michetti Piper Stringing, Inc., 526 U.S. 344 (1999).

12. A copy of this notice of removal is being served upon Plaintiff through his counsel of record and with the Clerk of the Court for the Circuit Court of Fairfax County.

WHEREFORE, Defendants hereby remove to the United States District Court for the Eastern District of Virginia the lawsuit now pending against them in the Circuit Court of Fairfax County.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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Counsel for INVESCO and SWIB

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1389-A

JUANITA ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Sept. 17, 2002]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendants Lincoln Property Co. ("Lincoln"), INVESCO institutional ("INVESCO") and the State of Wisconsin Investment Board Investment Co. ("SWIB") (collectively referred to herein as "Defendants"), hereby remove to this Court a civil lawsuit filed by Juanita Roche in the Circuit Court of Fairfax County, Law No. 206873. Without admitting any of the allegations of the Complaint, Defendants' grounds for removing this action are as follows:

1. On or about August 22, 2002, Plaintiff filed a twelve-count Complaint against Defendants in the Circuit Court of Fairfax County (the "State Complaint").

2. In the State Complaint, Plaintiff alleges negligence per se (Count I), breach of lease (Count II), breach of implied warranties (Count III), breach of contract (Count IV), actual fraud/intentional misrepresentation (Count V), constructive fraud/negligent misrepresentation (Count VI), consumer fraud (Count VII), false advertising (Count VIII), conversion (Count IX), intentional infliction of

emotional distress (Count X), and negligent infliction of emotional distress (Count XI). Plaintiff seeks compensatory damages and punitive damages of $100 million.

3. On August 30, 2002, Plaintiff's State Complaint was served (together with a summons) upon Defendants. See Ex. 1.[1] No other pleadings have been filed with the Circuit Court of Fairfax County.

4. This action is removable because if [*sic*] falls within the original diversity jurisdiction of this Court under 28 U.S.C. §§ 1332 and 1441(a). According to his [*sic*] Complaint, Plaintiff is a citizen of and is domiciled in the Commonwealth of Virginia.

5. Lincoln is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, Lincoln is a Texas corporation with its principal place of business in Texas.

6. INVESCO is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. Rather, INVESCO is a Delaware corporation with its principal place of business in Georgia.

7. SWIB is not incorporated in the Commonwealth of Virginia, nor does it have its principal place of business in the Commonwealth of Virginia. SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen.

8. Therefore, this case is removable by reason of diversity of citizenship because the amount in controversy is more than $75,000, exclusive of interest and costs, the parties are of diverse citizenship, and none of the Defendants is a citizen or resident of the Commonwealth of Virginia. Accordingly, this Court has jurisdiction to hear

[1] Exhibit 1, in accordance with 28 U.S.C. § 1446(a), includes all process, pleadings, papers, and Orders which have been served upon Defendants in the state court lawsuit that is being removed.

the subject matter of this action pursuant to 28 U.S.C. § 1332.

9. The United States District Court for the Eastern District of Virginia, Alexandria Division, is the proper venue for the action pursuant to 28 U.S.C. § 1441(a), because it is "the district court of the United States for the district and division embracing the place where such action is pending."

10. All Defendants have joined in the removal of this matter from the Circuit Court of Fairfax County to the United States District Court for the Eastern District of Virginia, Alexandria Division.

11. This notice of removal has been timely filed within 30 days after the earliest service of a summons and complaint. See Murphy Brothers, Inc. v. Michetti Piper Stringing, Inc., 526 U.S. 344 (1999).

12. A copy of this notice of removal is being served upon Plaintiff through his counsel of record and with the Clerk of the Court for the Circuit Court of Fairfax County.

WHEREFORE, Defendants hereby remove to the United States District Court for the Eastern District of Virginia the lawsuit now pending against them in the Circuit Court of Fairfax County.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
Connie N. Bertram (Bar No. 31713)
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Ave., N.W., Suite 1000
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Counsel for Lincoln Property Co.

/s/ JOHN SCALIA/KLV
John Scalia
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703-749-1300

Kenneth A. Lapatine
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885 Third Avenue, 21st Floor
New York, NY 10022
(212) 801-9200

Counsel for INVESCO and SWIB

[certificate of service omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTOPHE ROCHE, Plaintiff,	)	
v.	)	Law No. 206874
LINCOLN PROPERTY CO., INVESCO INSTITUTIONAL, and SWIB INVESTMENT CO., Defendants.	)	

[filed Sept. 18, 2002]

NOTICE OF FILING OF NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, on September 17, 2002, Defendants Lincoln Property Co., INVESCO Institutional and the SWIB Investment Co. filed a Notice of Removal for the above-referenced action with the Clerk for the United States District Court for the Eastern District of Virginia. A copy of the Notice of Removal is attached hereto.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
Connie N. Bertram (Bar No. 31713)
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Ave., N.W., Suite 1000
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Counsel for Lincoln Property Co.

/s/ JOHN SCALIA/KLV
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885 Third Avenue, 21st Floor
New York, NY 10022
(212) 801-9200

Counsel for INVESCO and SWIB

[certificate of service omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JUANITA ROCHE,
Plaintiff(s)

v. At Law No. CL-2002-0206873

LINCOLN PROPERTY CO., ET AL.,
Defendant(s)

FINAL ORDER

It appearing to the Court by the Notice of Removal received by this Court that this case has been removed to the United States District Court for the Eastern District of Virginia, Alexandria Division.

It is ADJUDGED and ORDERED that this cause is hereby REMOVED and stricken from the active docket of this Court.

ENTERED this 4th day of October, 2002.

/s/ STANLEY PAUL KLEIN
Circuit Court Judge

[Clerk stamp omitted]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHRISTINE [*sic*] ROCHE,
Plaintiff(s)

v. At Law No. CL-2002-0206874

LINCOLN PROPERTY CO., ET AL.,
Defendant(s)

FINAL ORDER

It appearing to the Court by the Notice of Removal received by this Court that this case has been removed to the United States District Court for the Eastern District of Virginia, Alexandria Division.

It is ADJUDGED and ORDERED that this cause is hereby REMOVED and stricken from the active docket of this Court.

ENTERED this 4th day of October, 2002.

/s/ STANLEY PAUL KLEIN
Circuit Court Judge

[Clerk stamp omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (CMH)

CHRISTOPHE ROCHE,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Oct. 8, 2002]

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

[text, signature block, and certificate of service omitted]

BEST AVAILABLE COPY

Westfield Village Apts
Apartment Lease Contract

Unit Number: 11104 **Unit Type..:** C1-1 **Lease Term :** 12 Months

1.	Current Date:	1. Friday, March 30, 2001
2.	Lessees/Residents Responsible for Lease (As defined in para. #1)	2. Christopher Roche & Juanita Castillo
3.	Address (See para. #2):	3. 5111 Woodmere Drive #104 Centreville, VA 20120
4.	**Commencement Date (See para. #2):**	4. **Sunday, April 1, 2001**
5.	**Ending Date (See para. #2):**	5. **Sunday, March 31, 2002**
6.	**Security Deposit Amount (See para. #3):**	6. **$300.00**
7.	**Monthly Rent (See para. #4):** **Prorated Rent (See para. #4):**	7. **$1,455.00** **$1,455.00**
8.	**Other (See para. #4):** **a. 10% late rent fee after the 5th of the month** **b. returned check fee**	8. **a. $145.50** **b. $30.00**
9.	**Rent Payable Management Office (See para. #4):**	9. **5115 Woodmere Dr. #103, Centreville, VA 20120**
10.	**Utilities Paid by Owner:**	10. **Refuse.**
11.	**Electricity Option (See para. #5):**	11. **Water/Sewer and Electricity paid by resident.**
12.	**Pro Rata Share (See para. #5):**	12. **N/A**
13.	**Occupants Only (See para. #6):**	13. **Roche, Christopher/Castillo, Juanita**
14.	**Resident's Name and Security Deposit Amount (See para. #7):**	14. **Deposit: 300.00** **Paid By: Christopher Roche and Juanita Castillo**
15.	**Early Termination Fee (See para. #8):**	15. **$1,455.00**
16.	**Pet Rent (See para. #17):**	16. **N/A**
17.	**Type of Pet(s) (See para. #17):**	17. **N/A**
18.	**Breed(s) of Pet(s) (See para. #17):**	18. **N/A**
19.	**Name(s) of Pet(s) (See para. #17):**	19. **N/A**
20.	**Color(s) of Pet(s) (See para. #17):**	20. **N/A**

21. **Emergency Release Representative (See para. #34)**

Resident Name:	Representative Name, Address:	Telephone:

22. **Special Provisions and Additional Agreements (See para. #34):**

Read and Accepted: _____ _____

1 THE PARTIES TO THIS LEASE (the "L ") are the owner of the Apartment (hereinafter referred to "Owner"), acting by and through its authorized agent, Lincoln Property Company (LPC) and the residents referenced on page one of this Lease (hereinafter referred to as "Resident").

2 Owner hereby leases to Resident the Apartment unit referenced on page one of this Lease (the "Apartment"), together with household furniture and furnishings, if any, described in the Furniture Inventory and Condition Form attached hereto as Exhibit "A" and made a part hereof. The Apartment is for use by Resident only as a private residence and not for any business or child care use, for a term commencing and ending as is referenced on page one of this Lease (the "Lease Term"). The Lease, subject to Owner's approval, may be renewed and the Lease Term extended by Resident by executing a Renewal Addendum. The Renewal Addendum shall have the same force and effect as the execution of a new lease. Unless another lease contract is signed by the parties which supersedes this Lease or a Renewal Addendum is signed, or unless a written notice of termination is given by either party at least forty-five (45) days prior to the end of the Lease Term, the Lease will be automatically renewed on a month to month basis with applicable month to month fees, during which time forty-five (45) days' written notice will be required in order for either party to terminate the Lease.

3 SECURITY DEPOSIT. Resident agrees that the Security Deposit set forth on page one of this Lease will be paid on or before the signing of the Lease. The Security Deposit is not advance Rent and cannot be applied to Rent by Resident. However, as provided in Paragraph 25 of the Lease, Owner may, under certain described conditions apply the Security Deposit toward Rent. Refunds of the Security Deposit shall be made in accordance with the terms of the Lease. A CONDITION TO THE REFUND OF THE SECURITY DEPOSIT IS THAT RESIDENT MUST PROVIDE OWNER WRITTEN NOTICE OF SURRENDER OF THE APARTMENT AT LEAST FORTY-FIVE (45) DAYS PRIOR TO THE EXPIRATION OR TERMINATION OF THE LEASE, OR ANY EXTENSION OR RENEWAL HEREOF.

4 **RENT. Resident(s) will pay rent per calendar month as is referenced on page one of this Lease (the "Rent"). Of the Rent, the amount set forth on page one of this Lease shall be allocated to furniture rental. Rent will be prorated from the date of move-in to the 1st day of the following month. Rent is due and payable in advance and without demand or offset at the Apartment Manager's office in the County referenced on page one of this Lease ON OR BEFORE THE 1ST DAY OF EACH MONTH. AFTER THE 1ST DAY OF THE MONTH THE RENT IS LATE, AND ALL REMEDIES IN PARAGRAPH 19 WILL BE APPLICABLE. Cash will not be accepted unless specifically authorized in writing in advance. At Owner's option, it may require that all Rent and other sums be paid in either cash, certified check, cashier's check or money order, and by one monthly payment rather than multiple payments. If Resident shall fail to pay any installment of rent within five (5) days of the date on which it is due and payable, Resident shall pay in addition to the rent, a late charge in the amount of ten percent (10%) of the rent due. The late charge is additional Rent. Acceptance of the Rent by Owner and anytime between the 1st and 5th day of the month is not a waiver of the due date for Rent. Resident's right to possession of the Apartment and all of Owner's obligations hereunder are expressly contingent on the timely payment of Rent. All monies received by Owner shall be applied first to non-rent items, then to Rent. RESIDENT WILL PAY A CHARGE OF $30.00 FOR EACH CHECK RETURNED TO OWNER BY A BANK OR OTHER ENTITY FOR ANY REASON. In the event that Owner receives two (2) non-sufficient fund ("NSF") checks, Owner may require that Rent and all other sums due be paid in either cash, certified check, cashier's check or money order.**

5 UTILITIES. Owner will pay for the utilities referenced on page one of the Lease; WHICH SHALL IN NO EVENT INCLUDE TELEPHONE. Resident shall pay for all other utilities. On or before move-in, Resident shall be responsible for notifying the appropriate utility companies for the purpose of placing said utilities in resident's name. Resident's failure to effect such change within three (3) days of move-in may result in Owner assessing as additional rent, resident's prorata utility charges together with a reasonable cost for determining such an assessment. Utilities shall be used only for ordinary household purposes and shall not be wasted by Resident. Owner reserves the right, at any time during the Lease Term, or any extensions or renewals thereof, to elect by giving Resident ten (10) days' written notice to either: (a) Require Resident to pay for all electricity consumed in the Apartment either directly to the utility company providing such electricity or by reimbursing Owner for the amount paid by said Owner to said utility company for such electricity so consumed in the Apartment. Resident shall independently contract and pay for all electricity consumed in the Apartment. Payment for electricity shall be made to Owner or said utility company, as the case may be, by Resident in accordance with monthly statements from the Owner or said utility company, which monthly statements shall be paid by Resident with the next month's Rent or as stated on the utility company bill. IN THE EVENT OWNER EXERCISES THIS OPTION, THE RENTAL AMOUNTS DUE FROM RESIDENT FOR EACH MONTH THEREAFTER SHALL BE REDUCED BY AN AMOUNT TO BE DETERMINED BY OWNER AT THE TIME SUCH OPTION IS EXERCISED; or (b) Require electricity be furnished to Resident on a submetered basis, at the expense of Resident. Charges for such electricity in each month or part thereof shall be computed by multiplying the number of kilowatt hours of electricity used by Resident times the per kilowatt hour rate paid by Owner for such month to the utility company furnishing such electricity. The bills which you will receive will be issued by Owner, not by the public utility company. The records and all electric meters in the Community shall be presumed to be correct for all purposes. Charges for such electricity shall be deemed to be "Rent" and are payable to Owner on the date stated in the bill, and Resident agrees that his covenant to pay such charges shall be a covenant independent of every other covenant of this Lease. The electric consumption for all Common Areas and common facilities will be paid for by Owner. Any dispute regarding the computation of Resident's bill or accuracy of the submetering equipment shall be between Resident and Owner. UPON COMMENCEMENT OF THE LEASE TERM, OWNER ELECTS TO EXERCISE EITHER OPTION (a) OR (b) AS INDICATED ON PAGE ONE OF THIS LEASE. In the event Owner elects to change the option referenced on page one of this Lease at any time during the Lease Term or extensions or renewals thereof, the option shall become effective on the first day of the month next following the expiration of the ten (10) day notice period. The amount of the reduction will remain constant throughout the remainder of the Lease Term and can be adjusted by Owner upon any renewals or extensions thereof. Resident shall have the right to make an examination of the Owner's utility bills for the Community for the purpose of verifying the accuracy of any statement furnished by Owner to Resident. Such examination shall be made and completed within fifteen (15) days after the statement with respect to which such examination pertains has been furnished to Resident, and shall be made at such times and such days as are reasonably convenient to Owner, after three (3) days' written notice to Owner requesting such examination. Owner further reserves the right, at any time during the terms hereof, or any extensions or renewals thereof, to elect by giving Resident ten (10) days' notice in writing of such election to require Resident to pay to Owner, as additional rent, Resident's Prorata Share (as hereinafter defined) of all water and gas consumed at the Community during each month or portion of a month during the Lease Term. Owner shall bill Resident monthly of Resident's Prorata Share of such water and gas costs for the prior month, which shall be paid by Resident with the next month's Rent. Resident's Prorata Share of such water and gas shall be adjusted for any partial month or occupancy on a per diem basis. Resident's Prorata Share shall be determined by multiplying the cost of all water and gas consumed at the Community (less the costs of water and gas attributable to the Common Areas) by a fraction, the numerator of which shall be the number of square feet in the Apartment and the denominator of which shall be the total number of square feet in all the apartments in the Community. It is hereby agreed and understood that Resident's Prorata Share shall be the percentage as referenced on page one of this Lease of the cost of all water and gas consumed at the Community. IN THE EVENT OWNER EXERCISES THIS OPTION, THE RENTAL AMOUNTS DUE FROM RESIDENT FOR EACH MONTH THEREAFTER SHALL BE REDUCED BY AN AMOUNT TO BE DETERMINED BY OWNER AT THE TIME SUCH OPTION IS EXERCISED. Owner has not, and cannot represent, warrant or covenant that the electricity rates now in existence shall continue in the future. Owner and Resident specifically agree that the responsibility of Resident to pay for electricity shall be unaffected by any rate increase and/or reclassification of Owner from one rate category to another rate category. Resident's failure to pay any electric, water or gas bill shall constitute a material violation of this Lease. The amount of any unpaid electric, water, or gas bill may be charged by Owner against Resident's Security Deposit. Residents will not allow electricity to be disconnected by any means, including the non-payment of bill, until the end of the Lease Term or renewal or extension period. Changes or the installation of utility lines, meters submetering or load management systems, and similar electrical equipment serving the Apartment shall be the exclusive right of Owner, provided such work is done in a reasonable manner and does not increase resident's utility costs.

6 THE APARTMENT WILL BE OCCUPIED ONLY BY THE ADULTS AND MINORS SPECIFIED ON PAGE ONE OF THIS LEASE. Those other than Resident will be referred to as "Occupants". Resident shall not sublet or assign the Lease and any attempt to do so without the prior written consent of Owner shall be void. Prior written consent of Owner is necessary in order to change Roommates. IF ROOMMATES ARE CHANGED WITHOUT THIS CONSENT, THE OLD ROOMMATE WILL REMAIN LIABLE FOR ANY DEFAULT INCLUDING THE PAYMENT OF RENT, BY THE NEW ROOMMATE.

7 MULTIPLE RESIDENTS. In the event more than one resident signs the Lease, each Resident is jointly and severally liable for all sums due under the Lease. The amount of any refund will be calculated without regard to who paid the Security Deposit and without regard to whose conduct resulted in any deductions

90

Read and accepted

therefrom. Security Deposits are collected for and remitted to the Owner by Lincoln Property Company , therefore, are a debt of Owner. Security Deposits are not necessarily held in trust by Owner. The Security Deposit shall be paid by the residents in the amounts set forth on page one of this Lease. Any refund of the Security Deposit due hereunder will be paid in proportion to the amounts paid as reflected on page one of this Lease in the event of more than one resident, and shall be made by one check jointly payable to all Residents.

8 EARLY TERMINATION. Resident may terminate the lease prior to the expiration of the lease term only based upon a job transfer of resident to a different geographic area, provided that resident provides landlord with verification of job transfer from employer at the time notice is given, and provided that resident is not in default hereunder at the time of giving notice, and agrees to strictly comply with the following terms: (a) To give Owner 45 days written notice; (b) to pay Owner all monies due through the date of termination; (c) to pay an amount set forth on page one of this Lease, as consideration for early termination; and (d) to pay a prorated portion which shall be included in the early termination fee, for make-ready expenses, such as shampooing carpet, repainting and cleaning based on the ratio of the number of months remaining in the initial term to the number of months in the original Lease Term. The foregoing shall not release Resident of any responsibilities and obligations regarding damage to the Apartment.

9 RESIDENT ACCEPTANCE. Within forty-eight hours of receipt of a Move-In Condition Form (MIC), attached hereto as Exhibit "B", and made a part hereof, Resident agrees to report to Owner in writing any such discrepancies between the information described in the MIC and the actual condition of the apartment. Owner shall then amend such form to correct such discrepancies. Resident's failure to report any defects or problems with the Apartment in writing within such time is and shall be a binding admission of the accuracy of such form. Any such written report from Resident is not and shall not constitute a written request for repairs within the meaning of Paragraph 15. OWNER MAKES NO IMPLIED WARRANTIES. IN PARTICULAR, OWNER DISCLAIMS AND EXCLUDES ANY WARRANTY THAT THE PREMISES AND ITS CONTENTS ARE FIT FOR ANY PARTICULAR PURPOSE OR ARE MERCHANTABLE. Owner will initially furnish light bulbs for the Apartment; thereafter, light bulbs will be replaced by Resident at Resident's expense. Resident accepts the Apartment subject to any existing or future recorded mortgage, deed of trust, or other lien applicable to the Apartment or its contents. The Apartment and all other areas which are reserved for Resident's private use shall be kept reasonably clean and sanitary by Resident. No alterations, improvements, painting, installations of antenna, telephone, computer, cable television outlets or dryer outlets will be permitted without the prior written consent of Owner. Resident may not change shower head devices, place water furniture, washers, dryers or similar appliances in the Apartment or otherwise alter the Apartment, its contents, fixtures or equipment of the Community without the prior written consent of Owner. A reasonable number of small holes in sheetrock walls and in the grooves of wood paneling will be allowed to hang pictures. Resident shall not duplicate keys to the Apartment or remove Owner's fixtures, equipment, security devices, electronic alarm system, furniture or furnishings from the Apartment for any reason. Upon the termination of the Lease for whatever cause, Resident covenants and agrees to promptly and peacefully vacate and surrender possession of the Apartment to Owner and promptly and peacefully surrender and deliver to Owner all of the personal property belonging to Owner, including, but not limited to, all those items of furniture and furnishings, if any, listed on Exhibit "A", in the same condition as when received, except for reasonable wear and tear.

10 NOTICE REQUIREMENT. All notices by Residents to Owner or its representatives including, but not limited, to notices: (a) requesting the name and address of Owner or LPC; (b) requesting the installation, change, rekeying or removal of a security device; (c) of malfunction of a smoke detector; (d) requesting installation, inspection or repair of a smoke detector; or (e) requesting repairs in accordance with Paragraph 14 hereof, shall be in writing and delivered to the location where Rent is to be paid. All notices by Owner, its agents and legal representatives to Resident shall be delivered to the Apartment or to such other address as Resident may designate by written notice to Owner. Unless otherwise agreed in writing between Owner and Resident, Owner, or its representatives may give resident notice by firmly affixing same to the Apartment door.

11 COMMUNITY POLICIES. Resident, Occupants, guests, invitees and others present at the Community with Resident's consent shall comply with all written Community policies which shall be considered part of the Lease and Owner may make policy changes if in writing and given to Resident. All such policies may be enforced through Owner's agents or legal representatives, and Resident shall hold same harmless for reasonable enforcement thereof. Resident may not operate any type of business or conduct any commercial activity in or from the Apartment. Garbage shall be disposed of only in designated receptacles. All parking lots, driveways, walkways, landscaped areas, laundry rooms, recreational areas, and other areas and facilities available for common use by Residents (the "Common Areas") are subject to Owner's exclusive control. Sidewalks, steps, outside hallways, entrances, walkways and stairs shall not be obstructed in any way or used for any purpose other than ingress or egress. Owner may impose such specific restrictions on resident's use of the Common Areas as it deems appropriate by giving notice by sign, letter or other means to residents, and violation of any such restrictions shall be a default by Resident. The Common Areas are to be used solely at the risk of the person using them. Owner may regulate or prohibit from the Apartment or Community motorcycles, mopeds, bicycles, tricycles, skateboards, roller skates, trampolines, exercise equipment, recreational vehicles, boats, trailer or inoperable vehicles. Resident shall not cause or permit the display of any sign or advertising matter which is visible outside the Apartment or is on the Common Areas or otherwise in the Community, without the Owner's prior written consent. Owner reserves the right to control the entry upon the Community by Resident's guests, agents, licensees or invitees, furniture movers, delivery persons, solicitors and/or salespeople. Owner may prohibit from the Apartment or Community guests or invitees who, in Owner's reasonable judgment, have been disturbing the peace, disturbing other residents, or violating Community policies. Resident, Occupants, guests, invitees and others present at the Community with Resident's consent shall not be disorderly, boisterous or unlawful, or disturb the peace or the rights and privileges of other residents, or permit any unlawful activities or any act or practice which will injure the reputation of the community. In the event Resident violates any law or Community policy, Resident shall be subject to the remedies provided for in Paragraph 19 herein.

12 LIABILITY. OWNER AND OWNER'S REPRESENTATIVES WILL NOT BE LIABLE FOR DEATH OR LOSSES OR DAMAGES TO PERSON OR PROPERTY OF RESIDENT, RESIDENT'S GUESTS OR OCCUPANTS CAUSED BY THEFT, BURGLARY, RAPE, ASSAULT, BATTERY, ARSON, MISCHIEF OR OTHER CRIME, VANDALISM, FIRE, SMOKE, WATER, LIGHTNING, RAIN, FLOOD, WATER LEAKS, HAIL, ICE, SNOW, EXPLOSION, SONIC BOOM, INTERRUPTION OF UTILITIES, ELECTRICAL SHOCK, DEFECT IN ANY OF THE CONTENTS OF THE APARTMENTS, LATENT DEFECT IN THE COMMUNITY, ACTS OF GOD, OTHER UNEXPLAINED PHENOMENA, ACTS OF OTHER RESIDENTS OR ANY OTHER CAUSE OTHER THAN THE GROSS NEGLIGENCE OF OWNER OR ITS REPRESENTATIVES ACTING IN THE COURSE AND SCOPE OF EMPLOYMENT. Resident will indemnify and hold harmless Owner and Owner's representatives for any liability, including costs and attorneys' fees, due to death, loss or damage to the person or property of resident, Occupants, guests, invitees or others present in the Apartment or at the Community with Resident's consent from any cause other than Owner's gross negligence or that of its representatives acting in the course and scope of employment, and from any liabilities arising as the result of the acts of Resident, Occupants, or others present with Resident's consent. OWNER AND ITS REPRESENTATIVES ARE NOT INSURERS. OWNER STRONGLY RECOMMENDS THAT RESIDENT SECURE INSURANCE TO PROTECT AGAINST ALL OF THE ABOVE CIRCUMSTANCES. Owner shall have no duty regarding security at the Community other than to make necessary repairs to security devices as provided in Paragraph 14. Resident acknowledges that Owner is under no obligation or duty to inspect, test, or repair any security device unless and until Owner has received written notice from Resident, except when the Lease Term begins and in the case of a smoke detector, when a new detector is installed by Owner. RESIDENT UNDERSTANDS THAT OWNER HAS RETAINED AN INDEPENDENT COMPANY TO PROVIDE A PATROL SERVICE WHICH IS AVAILABLE FOR DISTURBANCES, FIRE LANE VIOLATIONS, PROBLEMS WITH OUTDOOR LIGHTING AND PROBLEMS OF THAT TYPE. IN THE EVENT OF CRIMINAL ACTIVITY, THE POLICE DEPARTMENT IS TO BE CONTACTED FIRST BY RESIDENT. RESIDENT AGREES AND UNDERSTANDS THAT THE PATROL SERVICE IS NEITHER A POLICE FORCE NOR A GUARANTEED DETERRENT TO CRIME. Resident understands and agrees that Owner may alter or cancel the patrol service without his knowledge or consent. Further, Resident understands and agrees that Owner has no obligation or liability for the acts or omissions, whether negligent, intentional or otherwise, of any agent or employee of the patrol company or of any patrol company subsequently retained by Owner. RESIDENT UNDERSTANDS THAT CRIMES AGAINST PERSONS ARE PREVALENT, ESPECIALLY IN APARTMENT COMMUNITIES, and recognizes that Owner and its legal representatives are not insurers. Resident understands that Owner and its legal representatives do not guarantee, warrant or assure resident's personal security and are limited in their ability to provide protection. RESIDENT UNDERSTANDS THAT THE PROTECTIVE STEPS OWNER HAS TAKEN ARE NEITHER A GUARANTEE OR WARRANTY THAT THERE WILL BE NO CRIMINAL ACTS OR THAT RESIDENT WILL BE FREE FROM THE VIOLENT TENDENCIES OF THIRD PERSONS. RESIDENT HAS BEEN INFORMED AND UNDERSTANDS AND AGREES THAT HIS PERSONAL SAFETY AND SECURITY IS HIS PERSONAL RESPONSIBILITY. In particular, resident recognizes that it is more reasonable for each individual to determine what risks of

Read and accepted

loss are foreseeable and to protect again ch losses. Resident, therefore, agrees that it shall be his res, ability to obtain insurance to protect against Resident's losses and to take all other lawful and reasonable steps to protect his safety. Resident recognizes that Owner's efforts are voluntary and not obligatory and are done in an effort to reduce the threat of crime in the Community. Resident agrees that the furnishing of the safety devices and patrol service will not constitute a guarantee or warranty of their effectiveness or impose any obligation on Owner to continue them. Resident, therefore, hereby releases Owner, Agent and their respective agents, officers, directors, owners, partners, employees, employers and their legal representatives from any claim whatsoever with respect to any personal injury, property damage or death from the criminal acts of third persons or which is in any way related either to Resident's reliance on safety devices and patrol service mentioned above or to any defect, malfunction or inadequacy thereof. Resident will inspect the security devices and will be given the opportunity to make comments on their condition on Exhibit "B". These comments do not constitute a written request for repair as required by the Lease. Owner will make needed repairs of same only upon written request of Resident. Owner shall have no duty to furnish alarms of any kind, security guards, or additional security devices. Resident shall pay for and replace smoke detector batteries, and shall pay for monthly service on the electronic alarm system, if any, unless otherwise provided on page one of the Lease. Upon written request and payment of material costs, Owner will change or install additional locks. If Resident installs additional security devices, Owner shall be given the keys, codes or operating device immediately upon installation. Any notices or requests by Resident for inspection, installation or repair of security devices or smoke detector shall be in writing. If owner's representatives are requested to render services not contemplated by their employment contract, such as moving vehicles or furniture, cleaning, or delivering or accepting deliveries, such representative shall be deemed the agent of the Resident regardless of whether payment is arranged for such service; and Resident agrees to and does hereby release, indemnify and hold harmless Owner and its representatives from all liability regarding same. IMPORTANT: RESIDENT UNDERSTANDS AND AGREES THAT OWNER, ITS AGENTS, SERVANTS, EMPLOYEES AND LEGAL REPRESENTATIVES ARE LIMITED IN THEIR ABILITY TO PROTECT RESIDENT, RESIDENT'S OCCUPANTS, GUEST AND INVITEES FROM CRIME, ACCIDENT, OR NATURAL CATASTROPHE AND THAT RESIDENT IS BETTER ABLE TO EVALUATE INDIVIDUAL RISK AND LOSS AND OBTAIN INSURANCE TO PROTECT AGAINST SUCH EVENTS. RESIDENT THEREFORE AGREES THAT OWNER'S LIABILITY AND THAT OF ITS AGENTS AND LEGAL REPRESENTATIVES IS LIMITED TO THAT EXPRESSED IN THIS LEASE.

13 RESIDENT AGREES TO PAY TO OWNER WITHIN FIVE (5) DAYS after the demand the amount of any loss, property damage, or cost of repairs or service incurred by Owner, including damages from windows or doors left open, which is caused intentionally, negligently or by the improper use of the Apartment, Common Areas or the Community by Resident, Occupants, guests, invitees, pets or others at the Community with Resident's consent. Resident shall be responsible for all plumbing stoppages occurring in lines exclusively serving the Apartment, and damage to doors, windows or screens, unless due to the gross negligence of Owner or its representatives. Owner's delay in demanding damage reimbursements, late-payment charges, returned check charges or other sums due by Resident shall not be deemed a waiver of these charges; and Owner may demand same at any time (including at move-out); or Owner may deduct same from the Security Deposit. The rights and remedies of Owner under this Lease are cumulative, and the use of one or more thereof shall not exclude or waive the right to the use of any other remedy.

14 REPAIRS AND MALFUNCTIONS. RESIDENT SHALL PROMPTLY REQUEST, IN WRITING, ANY REPAIRS TO BE MADE TO THE APARTMENT OR ITS CONTENTS, FIXTURES, SECURITY DEVICES AND OTHER EQUIPMENT, ETC., WHICH BELONG TO OWNER, THAT ARE NECESSARY TO MAINTAIN IN PROPER CONDITION. EXCEPT IN CASE OF EMERGENCY WHEN ORAL REQUESTS TO THE MANAGEMENT OFFICE ONLY WILL BE ACCEPTED. In case of malfunctions of equipment, fixtures, security devices or utilities, or damage by fire, water or other cause, Resident shall notify Owner immediately. Owner shall, upon actual receipt by owner of such written (or oral, if authorized) request, act with reasonable diligence in making such repairs and the Lease shall continue and the Rent shall not abate during such period; provided, however, that Owner may require resident to pay any money due pursuant to paragraph 14 in regard to such repairs prior to making them. Should the Apartment, in Owner's sole discretion, become unfit for occupancy, Owner may refuse to repair and, by giving written notice, terminate the Lease. Owner may temporarily turn off equipment and interrupt utilities to avoid damage to property or to perform maintenance requiring the same.

15 WHEN OWNER MAY ENTER. Permission to enter or request for services from any resident shall be deemed to be from all residents. If resident, Resident's guests or Occupants are present, then Owner and its representatives or servicemen may enter the Apartment during reasonable times for any reasonable business purpose. Otherwise, Owner and its representatives or servicemen may enter by key, or by other means if locks have been installed which violate the terms of Lease, without notice to Resident if it is impractical to do so in case of emergency for the following purposes: repairs, extermination, maintenance, emergency safety or fire inspections, leaving notices, retrieving property, preventing waste of utilities, removing unauthorized locks, latches, or window coverings, and showing the Apartment to building inspectors, fire marshals, lenders, prospective purchasers, or insurance agents, or to prospective residents after notification of move-out or lease termination has been given. During any emergency, Owner or its representatives may forcibly enter the Apartment. Where the Apartment has been equipped with an electronic alarm system approved by Owner, the Owner and its representatives shall have the right to turn the system off to enter the Apartment and shall have the right to enter and allow the alarm to sound, for the above described purposes and Resident shall hold Owner and its representatives harmless for all personal property damage, death, injury or loss sustained or suffered by Resident, Resident's guests, invitees or Occupants on account of such entry by such persons for the above described purposes.

16 PETS. **Resident will not permit any pet or animal, even temporarily, anywhere in the Apartment or the Community without prior written consent of Owner. The presence of a pet or animal without such consent shall constitute a breach of a material condition hereof. Resident agrees to pay such additional rent as specified on page one of this Lease and to pay any increased Security Deposit for any pets permitted by Owner. Any such increased Security Deposit shall be considered as a general Security Deposit for any and all purposes, and refund of such deposit shall be subject to all of the terms and conditions set forth in this Lease. THE INCREASED SECURITY DEPOSIT IS NOT REFUNDABLE PRIOR TO SURRENDER OF THE APARTMENT, EVEN IF THE PET HAS BEEN REMOVED. It is understood and agreed by Resident that any expenses incurred by Owner or its representatives, including cleaning of carpet, in the extermination of fleas and ticks in the Apartment after termination of the Lease are recoverable by Owner from Resident and are not considered normal wear and tear. Resident agrees to pay Owner's cost for the extermination of fleas and ticks in the Apartment. In the event Owner agrees to permit Resident to have a pet in the Apartment Community, Resident agrees (a) to pay, as additional rent, an amount set forth on page one of this lease ("Pet Rent") per month per pet, not to exceed two pets; (b) that only the Pet(s) described and named on page one of this Lease will occupy the Premises and that no additional or different pet is authorized under the Lease; (c) that the pet will be kept inside the Apartment at all times except when on a leash and accompanied by and under the control of Resident; (d) that if the pet becomes annoying, bothersome, or in any way a nuisance to other residents or to the apartment operation, resident will immediately upon notice from the Owner remove the pet from the Premises or vacate the Apartment; and (e) that the pet will not exceed twenty-five (25) pounds in weight when full grown.**

17 RESIDENT SHALL NOT vacate the Apartment at any time without prior payment of all sums due or to become due for the entire Lease Term and any extensions or renewals thereof, nor shall resident be absent from the Apartment for any seven (7) consecutive days while any money is due to Owner. If Resident is absent from the Apartment for any seven (7) consecutive days during the Lease Term or any renewal or extension period while all or any portion of the rent is delinquent, the Apartment may be deemed abandoned.

18 DEFAULT BY OWNER. Owner agrees to act with reasonable diligence to: (a) keep Common Areas of the Community reasonably clean; (b) maintain fixtures, furniture, hot water, heating and/or air conditioning equipment; (c) remain in substantial compliance with applicable state and local laws regarding safety and sanitation; and (d) make all reasonable repairs, subject to Resident's obligation to pay for damages caused by Resident, Resident's guests, invitees or other Occupants. Resident may terminate the Lease for violation of the foregoing by Owner only after the following procedures have been followed: (a) resident shall make written request for repair or remedy of the condition, and all rents must be current at such time; (b) after receipt of such request, Owner shall have reasonable time to repair, considering the nature of the problem and the reasonable availability of materials, labor, and utilities; (c) if such reasonable time has lapsed and if owner has not made a diligent effort to repair, Resident shall then give Owner written notice of intent to terminate the Lease unless the repair is made within seven (7) days; and (d) repair has not been made within such seven (7) day period. In the event the Lease is terminated pursuant to this paragraph, Resident's Security Deposit and prorated Rent will be refunded as required by law.

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Read and accepted

19 DEFAULT BY RESIDENT. If Resident fails to pay rent or other lawful charges when due, including reimbursement for damages, repairs or plumbing service costs or if resident, resident's guest, invitees or other Occupants violate the covenants or conditions of the Lease or the community policies of Owner or its representatives, or applicable federal, state and local laws, or if Resident abandons the Apartment, then Owner may (with or without demand for performance) terminate resident's right of occupancy by giving resident written notice to vacate as required by law; and Owner shall be entitled to immediate possession by eviction suit. Notice may be given by mail or personal delivery to Resident or Resident's Apartment. Personal delivery to the Apartment may consist of affixing the notice upon any door leading into the Apartment. TERMINATION OF POSSESSION RIGHTS OR SUBSEQUENT RELETTING BY OWNER SHALL NOT RELEASE RESIDENT FROM LIABILITY FOR FUTURE RENT UNDER THIS LEASE. After Owner gives notice to vacate or after Owner files a petition for eviction, Owner may still accept rent or other sums due without waiving or diminishing Owner's right of eviction. Acceptance of monies at any time will not waive Owner's right to collect from resident for property damage, past or future Rent or other sums due. IN THE EVENT OF TERMINATION, OWNER MAY RELET THE APARTMENT, and if relet, any payments made after reletting shall be credited against sums due from Resident under this Lease. If Owner diligently attempts to relet the Apartment prior to the end of the Lease Term, Resident shall be liable, regardless of whether reletting attempts are successful for all costs incurred by Owner in placing the Apartment in condition to be relet, including, but not limited to, its administrative expenses which Owner and resident agree to be $50.00. Resident expressly agrees that any such costs shall not be deemed to be attributable to normal wear and tear. Such amount shall be due at move-out and shall satisfy Resident's liability for the above costs of reletting, but it will not satisfy or terminate Resident's liability for past due Rent, future Rent, cleaning, repairing, lock changes or other sums due under the Lease. Owner may report unpaid Rent, other sums due and/or NSF or returned checks to any local credit bureau or other similar collection or credit reporting service for permanent recordation in Resident's credit record. In any lawsuit involving contractual or statutory obligations of Owner or its representatives or Resident, the prevailing party shall be entitled to recover attorneys' fees and all other costs of litigation from the non-prevailing party. All amounts in any lawsuit judgment shall bear the highest lawful interest from due date until paid.

20 ACCELERATION. ALL MONTHLY RENT FOR THE REMAINDER OF THE LEASE TERM OR EXTENSION PERIOD SHALL BE ACCELERATED AUTOMATICALLY WITHOUT NOTICE FOR DEMAND AND SHALL BE IMMEDIATELY DUE AND DELINQUENT IF: (1) RESIDENT MOVES OUT, REMOVES PROPERTY IN CONTEMPLATION OF MOVING OUT OR GIVES NOTICE (IN PERSON OR BY AGENT) OF INTENT TO MOVE OUT PRIOR TO THE END OF THE LEASE TERM OR RENEWAL OR EXTENSION PERIOD AND (2) RENTALS FOR THE ENTIRE LEASE TERM AND RENEWAL OR EXTENSION PERIOD HAVE NOT BEEN PAID IN FULL. REMAINING RENTS SHALL LIKEWISE BE ACCELERATED IF RESIDENT IS EVICTED BY COURT ORDER. SUCH RIGHT OF ACCELERATION IS IN LIEU OF HAVING RENT FOR THE ENTIRE LEASE TERM PAYABLE AT THE BEGINNING OF THE LEASE.

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21 HOLDOVER. If Resident holds over and fails to move-out on or before the date required under the Lease, Resident shall be liable to pay triple rents for the holdover period and to indemnify Owner and/or prospective residents for damages incurred (including, but not limited to, lost Rent, lodging expenses and attorneys' fees) and at Owner's option, Owner may extend the lease term for one month by delivering written notice to Resident or the Apartment while resident is still holding over. Holdover Rents shall be immediately due on a daily basis and delinquent without notice or demand.

22 In order to clear an abandoned apartment, Owner and its representatives may enter the Apartment and remove and store all property of every kind found therein. Resident shall be liable for reasonable costs incurred by Owner and its representatives for packing, removing or storing property which has been abandoned, removed by agreement, seized under contractual lien or removed pursuant to court order. Owner and its representatives may sell seized property at public or private sale (subject to any recorded chattel mortgage) ten (10) days after written notice of the time and place of sale is sent by certified mail to Resident. Proceeds of the sale shall be first credited to the cost of sale, including storage costs, and then to Resident's indebtedness to Owner. Any surplus shall be mailed to Resident at the address to which the notice of sale was directed. None of the above procedures shall require prior court hearing. Resident releases and agrees to hold Owner and its representatives harmless from any claim or liability arising out of Owner's exercise of the lien rights granted by statute or by this paragraph.

23 RELEASE OF RESIDENT. Resident will not be released from the Lease on the grounds of voluntary or involuntary school withdrawal or transfer, voluntary or involuntary business transfer, layoff or termination, marriage, divorce, marriage reconciliation, loss of co-residents, bad health, death or any other reason, except as provided in Paragraph 8 or in the event of verification of enlistment or transfer in the armed services.

24 MOVE OUT PROCEDURES. Resident must give to Owner or Owner's representative written notice of intent to vacate at least forty-five (45) days prior to the last day of the Lease Term and any renewal or extension period. Verbal notice of termination will not be accepted. If Resident moves from the Apartment prior to the last day of the Lease Term, or any renewal or extension period, Resident shall be in default and subject to Paragraph 20 hereof. A Resident who moves out prior to the end of the lease term is no longer entitled to occupancy or keys. Return of the Security Deposit will be governed by the terms of this Lease. Prior to vacating the Apartment, Resident agrees to comply with the terms of Owner's Move-Out Instructions, and to otherwise leave the Apartment in the same condition as when leased, except for ordinary wear and tear and damages which Owner is required by Paragraph 15 to repair at its expense. The Apartment, including furniture, bathrooms and kitchen appliances must be cleaned thoroughly. After Resident vacates the Apartment, Owner or its representative will inspect the Apartment with the Move-Out Condition Walk Sheet and Owner's written Move-Out Instructions. Owner and its representative shall not be responsible for personal property which may be left at the Community after Resident has left the Apartment nor shall Owner and its representative be liable to Resident for any loss or damage to such property.

SECURITY DEPOSIT

25 DEDUCTIONS. Prior to refund, deductions may be made from the Security Deposit for the following items (a) a cleaning charge which shall be $50.00 for an efficiency and one (1) bedroom apartment, $60.00 for a two (2) bedroom apartment and $70.00 for three (3) bedroom apartment. Owner and resident agree that this amount is a reasonable estimate of the actual cost which Owner will incur and agree to be bound thereby and agree that such amount shall not be deemed attributable to normal wear and tear of the Apartment; (b) Owner's actual expenses for damages beyond normal wear and tear to the Apartment or its contents, including the electronic alarm system, if any, other than those related to repairs required by the Lease to be at Owner's expense; (c) Damages resulting from Resident's breach of Paragraph 9 of the Lease; and (d) Any other unpaid sums due to Owner under the terms of the Lease, including but not limited to late charges, returned checks, NSF check charges, bank service charges, service charges for which Owner has not been reimbursed, insufficient light bulbs, utilities for repairs, removal of illegally parked vehicles, unpaid damage claims, administrative costs, charges for removal of unauthorized locks, agreed costs of reletting, charges for removing, packing and storing abandoned, seized or lawfully removed property, attorneys' fees, court costs, charges for Owner's time and inconvenience in any valid eviction proceeding against Resident, unpaid utility charges, Rent and other lawful deductions. Charges may be made for change of door locks and new keys in the event Resident does not return keys or Rent has been accelerated under Paragraph 20 of the Lease or Resident has been evicted. Security Deposits will be first applied to non-rent items, then to unpaid rent. If lawful deductions exceed the total amount of deposits, Resident shall pay such excess amount upon written demand by Owner.

26 CONDITIONS FOR REFUND. After deduction of the items in Paragraph 25 above, if any, the balance of the Security Deposit(s), together with an itemized accounting of any deductions will be mailed to Resident no later than forty-five (45) days after surrender of the Apartment by ALL Residents who have signed the Lease. PROVIDED, THE FOLLOWING CONDITIONS ARE MET BY RESIDENT: (a) AT LEAST FORTY-FIVE (45) DAYS' WRITTEN NOTICE OF INTENT TO SURRENDER MUST BE GIVEN TO OWNER OR ITS REPRESENTATIVES PRIOR TO THE ENDING DATE OF THE LEASE TERM, RENEWAL OR EXTENSION PERIOD. VERBAL NOTICE WILL NOT SATISFY THIS CONDITION UNDER ANY CIRCUMSTANCES. THIS ADVANCE WRITTEN NOTICE OF INTENT TO SURRENDER IS A CONDITION TO REFUND, IN WHOLE OR IN PART OF, THE SECURITY DEPOSIT. (b) Resident must furnish Owner or its representatives with a written copy of Resident's forwarding address or addresses. Owner's representatives have no authority to estimate or commit to the amount or the deductibility of repairs, damages or charges prior to mailing of the itemized accounting.

Read and accepted _____

27 **SURRENDER.** For purposes of det ing relinquishment of possession, damages, clean-up c s and other deductions, "surrender" shall occur when (a) all Residents who signed the Lease live elsewhere and the move-out date has expired, (b) all keys have been turned in, or (c) when it reasonably appears that all Residents have permanently moved out and do not intend to return, whichever comes first.

MISCELLANEOUS

28 **FAILURE TO PAY FIRST MONTH'S RENT.** If Resident fails to pay the first month's Rent by the first day of the first rental period under the Lease, all future Rents may be accelerated and immediately due and payable. In addition, Owner may terminate Resident's right of occupancy and sue for damages, future rentals, attorneys' fees, court costs and other lawful charges.

29 **EMINENT DOMAIN.** In the event the Apartment is taken through the exercise of the power of eminent domain, the monthly Rent shall be paid by Resident to the date of ouster in the eminent domain proceedings at which time the Lease shall terminate. In the event of such taking, the entire award for damage to the Apartment, both leasehold and reversion, shall be the sole property, right and cause of cation of the Owner and Resident hereby assigns and conveys to Owner all of Resident's right, title and interest in and to any joint award made pursuant to any such proceedings. Resident hereby authorizes and empowers Owner in the name of the resident to pursue such remedies as may be available to Owner to receive such award for damages, and to make, execute and deliver in Resident's name any release or other instrument that may be required to recover such award or judgment.

30 **GENERAL. NO ORAL AGREEMENTS HAVE BEEN ENTERED INTO BETWEEN THE PARTIES. THIS LEASE IS THE ENTIRE AGREEMENT.** In particular, no statement of Owner or its representatives shall modify, change, add or delete provisions of this Lease unless in writing. In the event of more than one Resident, each resident is jointly and severally liable for each provision of the Lease, and notice to one Resident shall constitute notice to all Residents. Violation of the Lease by Resident, Resident's guests or Occupants shall be considered a violation by all Residents. Further, all demonstrations, inspections and explanations made by Owner or its representatives to one of the Residents of the Apartment shall be binding on all Residents of the Apartment with the same force and effect as if made to each of them. All obligations hereunder are to be performed in the county where the community is located. If Owner is unable to give resident possession of the Apartment at the agreed date for any reason, including construction, holdover, etc., Owner shall not be in default hereunder nor be liable to resident as a result of such delay, and the Lease shall remain in force subject to the following: (1) Rent shall be abated on a daily basis during such delay, and (2) Resident may terminate by giving written notice to Owner upon at least five (5) days written notice to Owner, whereupon Resident shall be entitled only to a refund of the Security Deposit and prepaid rent. Resident's right of abatement or termination shall not apply to cleaning or repair delays which do not prevent occupancy by Resident. All of Resident's statements in the rental application were relied upon by Owner in execution of the Lease. Resident may not withhold Rent or offset against Rent. In the event the Lease is executed prior to approval of Resident's rental application by Owner, the Lease shall not become effective until Owner has either tendered the Apartment to Resident or approved resident's application(s) in writing. Any clause of the Lease declared invalid by law shall not invalidate the remaining clauses in the Lease. It is specifically understood and agreed between the parties hereto that any obligation of Owner to pay money or other consideration to Resident shall be satisfied solely from the Owner's estate and interest in the property of which the Apartment is a part, or the proceeds thereof, and Resident covenants and agrees that only such financial interest will be pursued for the satisfaction of any remedy which Resident may have for the collection of money or other consideration from Owner by judicial process or otherwise.

31 **LINCOLN PROPERTY COMPANY'S STATUS.** Important: Read this Section carefully. It is specifically understood and agreed that LPC acts only as Agent for Owner. Responsibility for all obligations of Owner, including Security Deposits, rests entirely on such Owner. Resident agrees that LPC may exercise and shall have all of the rights, powers and benefits of Owner hereunder.

32 **THIS CONTRACT** may be executed in multiple copies. Omission of initials on any page of this Lease does not invalidate the Lease. A copy of Owner's Community policies will be furnished when Resident moves in, or earlier if requested.

33 **SPECIAL PROVISIONS OR ADDITIONAL AGREEMENTS:** In the event of an emergency, death, or illness involving Resident, Resident hereby authorizes Owner or its representatives to give Resident's key and release of all resident's possessions to the representative designated on page one of this Lease subject to Owner being directed otherwise by a Probate or other court of law. During the Lease Term or during any renewal or extension thereof, upon thirty (30) days' written notice to Resident.

34 Owner may increase the Rent. If Owner reasonably determines that the expenses fairly allocable to the Apartment for capital improvements to the Community, property taxes, utilities, charges for municipal services, insurance, or operating and maintenance expenses have increased by at least the amount of the rental increase, but in no event shall such increase exceed fifteen percent (15%) during the Lease Term. Owner reserves the right to increase Rent for reasons other than specified herein above upon forty-five (45) days' written notice to Resident, in which event Resident shall have an opinion to terminate the Lease by giving Owner written notice of termination within seven (7) days after receipt by the Resident of the aforesaid notice of Rent increase. In the event of termination by Resident, such termination shall be effective on the date of the scheduled Rent increase. Other provisions, if any, shall be set forth on page one of this Lease.

35 **HAZARDOUS SUBSTANCE.** Residents shall use no hazardous substance or hazardous materials in or around the apartment except for normal household cleaning products which will be used and stored in a manner consistent with such household use, and Residents shall dispose of such cleaning products in accordance with all applicable laws.

36 **THIS IS A BINDING LEGAL DOCUMENT. READ ENTIRE CONTRACT, WHICH CONSISTS OF PARAGRAPHS 1-34, EXHIBITS "A" and "B", AND ANY ADDENDA ATTACHED HERETO, CAREFULLY BEFORE SIGNING BELOW AND INITIALING ALL PAGES ATTACHED HERETO.**

Resident(s) _____ Date 03-30-01

_____ 03-30-01

_____ _____

_____ _____

OWNER: SWIR

By: LINCOLN PROPERTY COMPANY ECW, INC. AGENT
3500 Lincoln Plaza
500 North Akard
Dallas, Texas 75201-3394

By: _____

(Lincoln Property Company Agent)

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BEST AVAILABLE COPY

Lease Addendum
Westfield Village

Residents(s):	Christophe Babe + Juanita Castillo
Address:	5111 Woodmere Drive # 104
	Centreville, Virginia 20120

Early Termination Addendum: Resident may terminate the lease, prior to the expiration of the lease term, provided that the resident is not in default hereunder at the time of giving notice and further provides:

- Written notice to vacate at least forty-five (45) days prior to move-out, and,
- Pay owner all rents and other charges through date of termination, plus a termination fee equal to one months rent, prior to vacating and/or turning in keys to the apartment
- Resident pays owner all earned concessions during present lease term.

The foregoing shall not release resident of any responsibilities and obligations regarding damage to the apartment nor be construed as a waiver or release of resident from payment of rent and other charges, when due, through the date of termination. **No notice shall be effective unless and until the consent and signatures of all residents on the lease are obtained and submitted to owner**

Rent Payment Addendum: Rent is due on or before the 1st of every month without demand or deduction. Failure to pay by the 5th will result in a late payment of 10% of your market rent. After the 5th you must also pay by certified check, cashier's check or money order and it must include the late fees. NO PERSONAL CHECKS WILL BE ACCEPTED. If rent and late fee have not been paid by the 11th of the month, your account will be turned over to our attorney for judgment and possession of your apartment. In order to cancel legal proceedings, you must contact our attorney and make payment arrangements for all of the following, but not limited to, rent, late fees, and legal fees in certified funds. If rental payments are made late more than twice, the lease will be subject to termination.

If a rent check is returned for non-sufficient funds, a $30.00 NSF Fee will be charged as well as a late fee of 10% of market rent. The check must be redeemed in certified funds, as company policy does not permit us to re-deposit a check for any reason. Legal action will be taken on any returned check not paid within 48 hours. If a second check is returned on your account for non-sufficient funds, all future rent payments will need to be made in certified funds.

It is the policy of the Management not to accept partial payment by roommates however; roommates may pay with separate checks, provided the checks are received as one payment (i.e. at the same time). As a reminder, cash will not be accepted in the Management Office.

Married Couples/Roommate Addendum: In roommate and/or married couple situations, each person is always jointly and severally liable for all sums due, i.e. rent, late charges, damages etc., while all parties' names are on the lease. The deposit is placed on the apartment and is not refunded until the apartment is vacated. When the apartment is vacated, the balance of the security deposit will be refunded in one check, jointly payable to all residents named on the current lease. All parties must endorse the check in order for it to be cashed. FORGERY IS A FELONY. Do not endorse the security deposit refund check in behalf of a roommate/spouse. If a roommate and/or one spouse

moves out and is being replaced, but the other person(s) remains, the following applies:

- The departing resident must contact the Management Office to sign an Intent to Vacate form. If this form is not signed, the outgoing resident will remain jointly and severally responsible for the apartment.
- The replacement person(s) must qualify for residency before he or she moves in.
- The departing resident must complete the Assignment of Security Deposit (located on the Intent to Vacate form), transferring "...all right, title, and interest, if any, to (the) security deposit to the replacement person."
- The remaining and replacement person(s) must sign a new lease. This releases the departing person from responsibility for any future charges or future damages to the apartment.

If a roommate and/or one spouse moves out and the other person(s) chooses to assume responsibility for the apartment, the following applies:

- Same as above
- The remaining person must sign a new lease, thereby releasing the outgoing person from responsibility for any future charges or future damages to the apartment.
- If departing person is due any money, it must be collected from the remaining person(s). When the apartment is vacated, any refund or deposit due will be issued by check in the name of the remaining resident, as theirs should be the only name on the current lease.

If the appropriate documents are not signed, the original person(s) and/or married couple will continue to be jointly and severally responsible. When the apartment is vacated, the balance of the security deposit will be refunded in one check jointly payable to all residents originally listed on the current lease. In some cases, the lease is completed and one person wants to give a 45-day notice, however the remaining person(s) does not want to take full responsibility for the apartment. It is imperative the person(s) comes to an agreement; otherwise, all residents will remain jointly and severally responsible for the apartment.

Utility Responsibility Addendum: I do hereby understand that if I do not make arrangements to transfer Virginia Power accounts to my own name prior to moving in, my utility services will be disconnected 48 hours from my move-in date. In addition, a $15.00 utility transfer fee will be deducted from my security deposit upon move out.

Resident will be responsible for paying water and sewer provided in the apartment during the term of the lease. The apartment is individually metered for water use and Management has contracted with a third party to read water usage each month for each apartment and to bill residents for the amount of water and sewer usage attributable to the resident's apartment. Resident acknowledges and agrees that $2.00 per month is to be included in the cost of providing water and sewer service to the apartment each month for the expense of determining individual usage and for directly billing each resident. Resident agrees to pay a one-time account activation charge of $10.00. Failure to submit timely payment each month will result in a $5.00 late charge. The cost of providing water and sewer to the apartment is considered additional rent which becomes due in the month immediately following the date of billing to the resident. In the event such bill is not paid within 30 days of the due date, such failure to pay, at Management's election, shall constitute a default under the lease. Any amounts past due and/or your last water/sewer charges may be deducted from your security deposit.

Verified with Virginia Power @ (888) 667-3000 _____

Key Addendum: I understand that these keys are the property Westfield Village and must be returned when I vacate the apartment. There will be a $10.00 per key charge for each lost or not returned key at move out.
I have received __ apartment keys and __ mailbox keys. If additional keys are needed during your residency, a $1.00 charge will be added to your account. If you request for your locks to be changed, a fee of $25.00 will be charged at the time of the request.

Satellite Dish Addendum: Lincoln Property Company wants all residents to fully enjoy the utmost in beauty and lifestyle in their apartment home. Therefore, it will be necessary for all residents to observe the following minimal guidelines when installing a satellite dish.

- Only one satellite dish is permitted per apartment home.
- Satellite dishes must be one meter or less in size.
- Satellite dishes are restricted to the area within your private balcony or patio, and should not extend beyond the patio or balcony railing. No satellite dishes will be permitted in common areas or breezeways.
- Satellite dishes may not be placed or hung on roofs, outside walls, windowsills or railings. Drilling or puncturing of outside walls, railings, roofs or windowsills will not be permitted.
- A qualified person or company with worker's compensation insurance and adequate public liability insurance must do installation of the dish. We reserve the right to inspect and approve installation procedures.
- Installation must comply with reasonable safety standards and may not interfere with the community's cable, telephone or electrical systems or those of neighboring properties.
- The satellite dish and all related equipment must be removed upon move-out. The resident will be responsible for any damages and for the cost of repairs or repainting that may be reasonably necessary to restore the premises to its condition prior to installation.
- Resident is fully responsible for the satellite dish and all related equipment. Resident also agrees to defend, indemnify and hold harmless Lincoln Property Company and/or Owner from any claims by others relating to the satellite dish, its installation and/or related equipment.
- Proof of renter's insurance with a minimum liability coverage amount of $10,000 is required before installation. Please bring a copy of your liability insurance to the office.

Community Policies: I have read and agree to all terms and conditions to the Westfield Village Community Policies.

Package Release: Westfield Village will accept packages from commercial delivery services (UPS, Federal Express, etc.). I hereby release Westfield Village apartments (owners, agents, representative, or contractors) from all liability during acceptance and storage of packages received. Residents agree to pick up packages within 48 hours of notification in order to avoid return.

Pet Addendum: A per pet deposit will be paid in the amount of $300.00 (in addition to the apartment security deposit) of which $150.00 is non-refundable. Additionally, a $15.00 per month pet rent will be charged per pet.

- Resident agrees that only pet(s), not to exceed 2 described and named below, will occupy the premises. No additional or different pet is authorized under this agreement.
- Resident agrees that the pet(s), will be kept inside the apartment at all times except when on a leash accompanied by and under control of the resident.

Also, resident agrees to pick up after the pet on the apartment grounds. Resident understands, failure to do so will result in a $50.00 fine.

- Resident agrees that if the pet(s) becomes annoying, bothersome or in any way a nuisance to other residents or to the apartment operation, the resident will immediately upon notice from management, remove the pet(s) from the premises or vacate the apartment unless an agreement can be reached between both parties.
- Resident agrees that pet will not be tied or staked outside the apartment and may not be left unattended on patios or balconies. In addition, pet food is not permitted in the breezeways or patio/balcony areas.
- Resident agrees that the pet will not exceed 25 pounds in weight when fully grown.

Type:	Type:
Breed:	Breed:
Name:	Name:
Age:	Age:
Color:	Color:

Read and accepted (pg1-4):

Signature of all Residents

Signature of Owner's Representative

5111 Woodmere Dr # 104
Centreville, VA 20120

I understand that this key is the property of Westfield Village and must be returned when I vacate the apartment. There will be a $10.00 per key charge for lost or not returned keys at move out.

I acknowledge receipt of 1 (one) mailbox key for my apartment.

If a request is made for the locks to be changed, a fee of $25.00 will be charged at the time of the request.

Name

2/01/03
Date

Signature

Water & Wastewater
Account Activation Request

Property Westfield Village

Resident Name Roche (Last) christophe (First) (MI)

Street Address 5111 Woodmere Drive Unit # 104

City Centreville, State VA, Zip Code 20120

Mailing Add. (if different) _____

Home Phone 703 855-9500 Bus. Phone 703 222-6714

Employer Marketing Ventures Assc.

Roommate or Spouse Name Juanita ~~Castillo~~ Castillo

Employer Same Bus. Phone Same

Total # of Occupants 3

Lease Term 12 (mo.) Move-in Date 3/31/01 Move-out Date 3/30/02

Meter Reading and/or Billing / Collection Service	***Fee***
Monthly Service Charge	$2.00/mo.

Miscellaneous Charges	***Charge***
Account Activation	$10.00
Past Due	$5.00
Returned Check	$25.00

Resident understands and agrees that water and wastewater charges are considered additional rent. Resident understands that failure to pay water and wastewater charges is an event of default under the lease agreement which could result in legal action to have the resident evicted from the premises. Any outstanding balance may be deducted from your security deposit at lease termination.

Resident Signature Juanita Castillo Date 3/30/01

Leasing Agent Signature Marlene Luis Date 3/30/01

Residents, your account will automatically be established by property management. For future billing questions or comments, you may call us at (800) 546-6701.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[Nov. 27, 2002]

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendants Lincoln Property Co.'s ("Lincoln"), INVESCO Institutional's ("INVESCO"), and SWIB Investment Co.'s ("SWIB") (collectively, "Defendants") motion to dismiss the Plaintiffs' complaint pursuant to Rules 8(a)(2), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. This case concerns Plaintiffs Christophe and Juanita Roche's claim that Defendants failed to properly maintain their apartment, that such failure allowed toxic levels of mold to develop in various areas of the apartment, and that these toxic mold levels caused Plaintiffs and their family, including their pets, various personal and monetary injuries. The issues before the Court: (1) whether the Plaintiffs' complaint improperly groups the Defendants denying them of fair notice as to which claims are specific to each Defendant; (2) whether the Plaintiffs plead fraud with the specificity required under Rule 9(b); and (3) whether the Plaintiffs' twelve counts state a claim for which relief may be granted. The Court holds that the Complaint fails to

allege how each Defendant injured Plaintiffs, as required by Rule 8(a). Moreover, the Complaint fails to plead fraud or constructive fraud with the specificity required by Rule 9(b), and, except as to Count I, the Complaint fails to state a claim for which relief may be granted under Virginia law.

I. BACKGROUND

Plaintiffs entered into a lease (the "Lease") with SWIB, as owner, and Lincoln, as property manager, to rent an apartment at Westfield Village, an apartment complex in Centreville, Virginia. In its advertisements for the Westfield apartments, Lincoln stated that it "provided exemplary service in a quality home environment." (Compl. ¶ 19.) Plaintiffs allege that this representation was "the primary and material reason why [they] entered into the Lease." (*Id.*)

Plaintiffs notified Lincoln on several occasions of water leaks that needed repair, of holes that had been cut in the wall that needed repair, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) Plaintiffs notified Lincoln of these problems orally and in writing; Lincoln disregarded these warnings and requests. (Compl. ¶ 18.)

Plaintiffs allege that toxic levels of mold developed within the apartment due to the moisture damage from the leaky fixtures; in March 2002, a consultant conducted testing in the apartment and discovered that there was "extensive" mold contamination in the apartment. (Compl. ¶ 28.) These toxic levels of mold "adversely affected the personal property and health of the Roche family." (Compl. ¶ 16.) Plaintiffs allege several health-related injuries and personal property damage valued at $165,000. (Compl. ¶¶ 20-21, 26, 29, 34, 47, 48, 49.)

Plaintiffs allege that Lincoln had notice of the mold problem at this property and other properties managed by Lincoln in the Northern Virginia area. (Compl. ¶¶ 33-39.) Furthermore, Lincoln temporarily relocated the Plaintiffs

to another location, allegedly contaminated as well. (Compl. ¶¶ 33-34.) Plaintiffs contend that Lincoln engaged in a course of deception by not notifying its residents, at several properties, of the toxic mold problem. (Compl. ¶¶ 37-39.) Finally, Plaintiffs allege that Mr. Roche was the subject of a retaliatory adverse employment action when he notified Lincoln, his employer, of the mold problem in his and other units within Westfield. (Compl. ¶¶ 41-45.)

II. DISCUSSION

A. Standard of Review

1. Fed. R. Civ. P. 8(a)(2) – A Pleading Shall Set Forth a Short and Plain Statement of the Claim Showing That the Pleader is Entitled to Relief

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that "[a] pleading which sets forth a claim for relief, . . . , shall contain (2) a short and plain statement of the claim showing that the pleader is entitled to relief." In order to comply with Rule 8(a)(2), a complaint must provide the defendants "fair notice of the claim and grounds upon which it rests." *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998). Where the complaint names several defendants, the complaint must allege, with precision, the wrongful conduct charged to a particular defendant and cannot plead all of its claims against all defendants collectively. *See Nagel v. ADM Investor Servs. Inc.*, 995 F. Supp. 837, 845 (N.D. Ill. 1998). The complaint must discuss each defendant's acts and the resulting injury to the plaintiff.

2. Fed. R. Civ. P. 9(b) – Pleading Fraud with Specificity

Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). This heightened pleading requirement for fraud serves the purposes of providing defendants with fair notice of the plaintiff's claim, protecting defendants from harm to their reputation or goodwill, and reducing the number of nuisance or "strike" suits. *Weill v. Dominion*

Resources, Inc., 875 F. Supp. 331, 338 (E.D. Va. 1994). In multiple-defendant cases, the complaint must allege the specific fraudulent actions credited to each defendant. *See Goldstein v. Malcolm G. Fries & Assoc., Inc.*, 72 F. Supp. 2d 620, 627 (E.D. Va. 1999). *See also, Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997) (dismissing fraud claim where plaintiffs had lumped together all of their allegations of fraud against the defendants); *Vicom Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778 (7th Cir. 1994) (stating that a complaint that lumped all the defendants together and did not specify who was involved in what fraudulent activity was insufficient under Rule 9(b)).

3. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim Upon Which Relief May Be Granted

A Rule 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiffs, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley*, 355 U.S. at 47. This initial standard sets out how the Court construes the Complaint. The follow-on sections provide the substance in analyzing a 12(b)(6) motion.

B. Analysis

Considering the various standards of review involved in this motion to dismiss and construing the allegations in

the Complaint in the light most favorable to the Plaintiff, the Court dismisses the Complaint as to all counts. The reasons for dismissal as to each count are set forth below. Furthermore, the Court dismisses Defendant INVESCO from this suit as Plaintiffs have failed to allege how INVESCO was a party to the lease or to the management of the Westfield apartments.

1. Count I – Negligence

Although the Court finds that Plaintiffs have substantiated a claim for negligence on behalf of the maintenance management company at Westfield apartments, this count fails because the Complaint does not set out, with specificity, the acts of each particular defendant. The Complaint alleges that "the defendants had a duty to maintain the Roche apartment with due care in accordance with their duties as a landlord, . . . ," (Compl. ¶ 52) and that "the defendants breached" this duty (Compl. ¶ 53). The Complaint lumps the Defendants together and does not allege the wrongful conduct of each individual Defendant; hence, the Complaint does not provide Defendants sufficient information to frame a responsive pleading. The Complaint is infirm with references to "the defendants" without specifying which Defendant engaged in the allegedly wrongful conduct; however, the Court does not dismiss the Complaint as a whole on this basis because the other counts are substantively infirm.

2. Count II – Breach of Lease

The Court dismisses Count II, except to the extent that the claim is derived from provisions in the Lease. Plaintiffs allege that "[p]ursuant to the Lease between the defendant and Roche, the defendants provided an express warranty with respect to their duties to properly maintain the referenced premises." (Compl. ¶ 59.) Plaintiffs fail to specify the particular "express warranty," within the Lease, that Defendants violated; these allegations fail to withstand a motion to dismiss because they do not provide Defendants notice of the grounds of the claim.

The other allegations within Count II refer to Defendants' breach of their warranty obligations contained in "advertisements and inducements." (Compl. ¶ 61.) These allegations, however, do not support a claim for breach of the Lease because, as contended by Defendants, the integration clause in the Lease (Defs.' Ex. A at ¶ 30) precludes Plaintiffs from asserting a claim based on representations outside of the Lease. *See Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 593-94 (4th Cir. 1999) (stating that, under Virginia law, plaintiff could not base breach of contract claim on discussions prior to the execution of the contract because the written contract contained an integration clause) (citing *Spotsylvania County School Board v. Seaboard Surety Co.*, 415 S.E.2d 120 (Va. 1992)). The Court dismisses Count II except to the extent that the claim is derived from a breach of a particular provision in the Lease.

3. Count III – Breach of Implied Warranties

Plaintiffs' main contention in this count is that the Defendants breached the common law implied warranty of habitability. In Virginia, however, there is no common law implied warranty of habitability between landlord and tenant. *Powell v. John E. Hughes Orphanage*, 138 S.E. 637, 644 (Va. 1927). The Virginia Supreme Court stated that "the tenant hires at his peril, and a rule similar to that of *caveat emptor* applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and providing against their ill effects." *Id.* Thus, Plaintiffs' Count III is dismissed because, as a matter of law, Plaintiffs, as tenants, cannot recover under this theory.

4. Count IV – Breach of Contract

Plaintiffs allege that the Defendants entered into a contract when they "agreed to perform some of the requested repairs in consideration of Roche's forbearance in filing any type of legal claim or action against them regarding the mold condition." (Compl. ¶ 76.) Plaintiffs allege that Defendants breached this contract when they "refused to

give the assurance that the apartment would be free from the toxic mold condition." (Compl. ¶ 77.) This implied contract, however, arose under the Lease agreement, an express contract.

Plaintiffs are precluded from asserting an implied contract claim against Defendants under Virginia law because a valid contract already existed governing the rights and duties with respect to the lease of the apartment. *Ellis & Meyers Lumber Co. v. Hubbard*, 96 S.E. 754, 760 (Va. 1918) ("It is only in the absence of an express or of an enforceable contract between the parties that they [*sic*] law will, from circumstances, imply a contract between them."). Plaintiff entered into the Lease with Defendants Lincoln and SWIB; the Lease governed the rights and duties with respect to the lease of the apartment at Westfield Village. Furthermore, the Lease contained a valid integration clause, thereby precluding any implied contracts. Count IV is dismissed as a matter of law for failure to state a claim upon which relief may be granted.

5. Count V – Fraud / Intentional Misrepresentation

Plaintiff alleges in the Complaint that "[t]hrough its sales brochure, and advertisements, defendants misrepresented that plaintiff's home was of high quality and would be maintained." (Compl. ¶ 83.) Plaintiffs assert that they relied on these alleged misrepresentations when they entered into the Lease. (Compl. ¶ 85.)

Under Virginia law, a plaintiff must plead and prove that: (1) the defendant made a false misrepresentation of material fact, (2) the representation was made intentionally and knowingly and with the intent to mislead, and (3) the plaintiff reasonably relied on this representation to his detriment." *Graham v. RRR*, 202 F. Supp. 2d 483, 491 (E.D. Va. 2002). Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). At a minimum, the plaintiff must plead "the time, place, content, and identity of authorship of any alleged misrepresentation." *Goldstein*

v. Malcolm G. Fries & Assoc., Inc., 72 F. Supp. 2d 620, 627 (E.D. Va. 1999); *see also Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994); *Katz v. Household Int'l, Inc.*, 36 F.3d 670, 675 (7th Cir. 1994).

In this case, the Complaint lacks the specificity required by Rule 9(b)'s heightened pleading requirements. Plaintiffs do not set forth specific allegations as to each individual Defendant. (Compl. ¶¶ 82-88.) Plaintiffs fail to specify or to provide the advertisements or brochures that induced them to enter into the Lease; Plaintiffs fail to specify how they reasonably relied on a particular false statement.

Furthermore, a fraud claim must be based on a representation of material fact: "a present or preexisting fact, it cannot be predicated on unfulfilled promises or statements as to future events." *Parker-Smith v. STO Corp.*, 551 S.E.2d 615, 619 (Va. 2001). A mere expression of opinion will also not suffice. *McMillion v. Dryvit Sys., Inc.*, 552 S.E.2d 364, 370 (Va. 2001). Plaintiffs base their fraud claim on their allegations that Lincoln represented that "the apartment was of high quality" and that "there was prompt attention for emergency maintenance." (Compl. ¶ 84.) The representation that the apartment was "of high quality" is a statement of opinion, and, absent more information, the statement is not actionable as fraud. Plaintiffs have not alleged that Defendants failed to provide prompt attention to an emergency situation. The fact that Plaintiffs lived in the allegedly mold-ridden apartment for one year does not constitute an emergency. Plaintiffs' allegations fail to meet the heightened pleading standards of Rule 9(b) and fail to state an actionable claim for fraud; Count V is dismissed.

6. Count VI – Constructive Fraud / Negligent Misrepresentation

Under Virginia law, in order to state a claim for constructive fraud, the plaintiff must allege that (1) there was a material false representation, (2) the hearer believed it to be true, (3) it was meant to be acted on, (4) it

was acted on, and (5) damage was sustained. *Nationwide Inc. v. Patterson*, 331 S.E.2d 490, 492 (Va. 1985). Pleadings for constructive fraud must also meet the heightened requirements of Rule 9(b). Like Plaintiffs' actual fraud claim, their claim for constructive fraud fails to meet the requirements of Rule 9(b). *See supra*, Part II.B.5. Count VI is dismissed.

7. Count VII – Consumer Fraud

Plaintiffs allege that Defendants violated the Virginia Consumer Protection Act ("VCPA") by, among others, "[a]dvertising goods or services with the intent not to honor their claims" (Compl. ¶ 96.f), "[o]ffering for lease defective goods" (Compl. ¶ 96.g), omitting that they knew about the "inherently defective piping systems" (Compl. ¶ 96.b). However, the VCPA does not apply to "[a]ny aspect of a consumer transaction which is subject to . . . the Virginia Residential Landlord and Tenant Act . . . unless the act or practice of a landlord is a misrepresentation or fraudulent act or practice under § 59.1-200 [of the Virginia Code]." Va. Code Ann. § 59.1-199.E (2002). Because Plaintiffs fail to state a claim for fraud and the VCPA does not cover landlord-tenant leases, Count VII is dismissed.

8. Count VIII – False Advertising

Count VIII is dismissed for the reasons set forth in Count VII in that the Virginia Consumer Protection Act does not apply to a residential landlord-tenant dispute.

9. Count IX – Tortious Interference with Contract by Improper Methods

In Count IX, Plaintiff Christophe Roche alleges tortious interference, by Defendants, with his at-will employment contract. Mr. Roche alleges that Lincoln interfered with his at-will employment agreement by "employ[ing] verbal and written attempts to discredit, defame and ostracize the plaintiff with the motive to terminate him" (Compl. ¶ 107), and by "defrauding him and giving him false assurances that they would abide by their grievance procedure, which they have refused to honor" (Compl. ¶ 108).

Mr. Roche's claim fails as a matter of law because Lincoln cannot tortiously interfere with its own contract. *Chaves v. Johnson*, 335 S.E.2d 97, 120 (Va. 1985). Plaintiffs' tortious interference with a contract claim does not survive this motion to dismiss because Lincoln cannot tortiously interfere with its own contract: Count IX is dismissed.

10. Count X – Conversion

Plaintiffs allege that the "defendant converted the personal property of Roche" (Compl. ¶ 113) without alleging the identity of the "defendant." This type of pleading fails to specify which of the Defendants converted the Roches' property. Count X is dismissed because it fails to notify the Defendants which of them engaged in the conversion of Plaintiffs' property. The Court does not make a finding as to the viability of the substantive merits of the claim.

11. Count XI – Intentional Infliction of Emotional Distress

Plaintiffs' main allegation is that the Defendants' conduct "was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." (Compl. ¶ 118.) To establish a claim for intentional infliction of emotional distress ("IIED"), Plaintiffs must show that (1) the defendants' conduct was both intentional or reckless and outrageous and intolerable, (2) a causal connection between the conduct and Plaintiffs' emotional distress, and (3) the emotional distress was severe. *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991). The Virginia Supreme Court has set a high bar to establish a claim for IIED: "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* Plaintiffs, in this case, rely on allegations that the Defendant landlords' maintaining a mold-ridden apartment certainly poses a health risk to occupants; however this conduct is negligent, not outrageous as a matter of law. These acts are disturbing, but insufficient to meet the high bar that Virginia has

established for IIED claims. Count XI is dismissed for failure to state a claim for which relief may be granted.

12. Count XII – Negligent Infliction of Emotional Distress

Plaintiffs incorporate all of their previous allegations and add that they have suffered "physical manifestations of injury." (Compl. ¶ 121-22.) Under Virginia law, a claim for negligent infliction of emotional distress ("NIED") must be the "natural result of fright or shock proximately caused by the defendant's negligence." *Delk v. Columbia/HCA Healthcare Corp.*, 523 S.E.2d 826, 834 (Va. 2000). The Virginia Supreme Court requires a "clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury." *Id.* Plaintiffs' conclusory allegation that they suffered physical manifestations of injury as a result of Defendants' conduct is not sufficient to support a cause of action for NIED. *See id.* Plaintiffs fail to plead with specificity that they incurred a physical injury which was "the natural result of fright or shock proximately caused by the defendants' alleged negligence." *Id.* Therefore, the Court dismisses Count XII of the Complaint.

13. Punitive Damages

Under Virginia law, punitive damages are awarded "only in cases of the most egregious conduct." *Phillip Morris Inc. v. Emerson*, 368 S.E.2d 268, 283 (Va. 1998). To support an award of punitive damages, a plaintiff must allege conduct evincing a conscious disregard of others' rights. *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 683-83 (Va. 1982). Claims of negligence are, generally, insufficient to support a prayer for punitive damages. *Wallen v. Allen*, 343 S.E.2d 73, 78 (Va. 1986). A plaintiff must set forth facts establishing that the defendant "act[ed] consciously in disregard of another person's rights or act[ed] with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably

would cause injury to another." *Phillip Morris*, 368 S.E.2d at 283.

In this case, Plaintiffs make conclusory allegations about the legal effect of facts. The Complaint fails to provide any facts establishing that the Defendants acted with the requisite state of mind for an award of punitive damages. (*See* Compl. ¶¶ 86, 107, 108, 109, 116.) The Complaint's punitive damage prayer is dismissed.

14. INVESCO is Dismissed as a Defendant

Plaintiffs allege that INVESCO was the owner of the apartment where Plaintiffs lived because SWIB was wholly owned by and/or an affiliate of and/or a subsidiary of INVESCO. No pleadings lead to the conclusion that INVESCO, an independent corporate entity than [*sic*] SWIB, owned the apartment in question. INVESCO is not mentioned in the Lease. Plaintiffs seek to engage in a fishing expedition to determine if INVESCO is a correct defendant; they seek discovery on this issue. The Court does not grant this request because it is a waste of time and judicial resources. The court dismisses INVESCO as a defendant in this suit until Plaintiffs can show that INVESCO purchased the apartment in question from SWIB or that INVESCO assumed management responsibilities under the Lease.

III. CONCLUSION

The Court dismisses Counts I and X because Plaintiffs fail to plead with specificity the "bad acts" attributed to each Defendant. The Court dismisses Count II except to the extent that a claim therein is derived from a breach of a provision within the Lease. The Court dismisses Counts III, IV, VII, VIII, and IX because they fail as a matter of law and relief cannot be granted under any circumstances. The Court dismisses Counts V and VI because Plaintiffs fail to plead fraud with the specificity required by Rule 9(b). The Court dismisses Counts XI and XII because Plaintiffs have not met the high standard established in Virginia for pleading intentional infliction of emotional distress or negligent infliction of emotional

distress. The Court dismisses Plaintiffs' punitive damage prayer for failure to proffer any facts in support of that claim. The Court dismisses INVESCO as a defendant because Plaintiffs fail to establish how INVESCO is connected to the landlord-tenant transaction in question.

For the reasons previously stated, it is hereby

ORDERED that Defendants Lincoln Property, et al.'s Motion to Dismiss the complaint is GRANTED. It is further ORDERED that INVESCO Institutional is DISMISSED from this action.

The Plaintiffs are GRANTED leave to file an amended complaint within twenty days of this Memorandum Order. The Court declines to accept the proffered Amended Complaint filed on October 25, 2002, because Plaintiff did not have the benefit of this ruling to consider prior to drafting the Amended Complaint. Defendants are GRANTED twenty days, from the time of filing of the amended complaint, to respond.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 27th day of November, 2002.

/s/ GERALD BRUCE LEE
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
11/27/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB,
Defendants.

[filed Dec. 16, 2002]

SECOND AMENDED COMPLAINT

COMES NOW, the Plaintiff, Christophe Roche and Juanita Roche, by counsel, and for his amended Complaint states as follows:

1. Plaintiff, Christophe Roche, is a citizen of Fairfax County, Virginia, residing at 13620 Bent Tree Circle, Unit 302, Centreville, Virginia 20120.

2. This Court has jurisdiction of this matter as all of the causes of actions and injuries occurred in Fairfax County, Virginia.

3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. [Henceforth, Lincoln Property Company will be referred to as ("Lincoln").]

4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.

5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

6. SWIB Investment Company, was the owner of 5111 Woodmere Drive, Centreville, Virginia. [Defendant, SWIB Investment Company will hereafter be referred to as ("SWIB").]

7. Lincoln advertised in newspapers and in realtor brochures that it was the owner and property manager and maintainer of the premises known as Westfield Village Apartments and other apartment complexes in the Northern Virginia region. The public and respective apartment lessees were led to believe that these apartment projects and complexes were owned and operated entirely by Lincoln Property Co. In fact, the respective lessees would not know anything about who "SWIB" was until they executed the lease documents, at which time, and for the first time, they would see the name of "SWIB" as the owner of the premises.

8. After executing leases, the lessees, including the plaintiff, never knew anything about who "SWIB" was or how it operated, and all of its dealings were through the offices and staff of the Lincoln Property Co. All dealings and correspondence were with and through Lincoln.

7(b). The Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment.

8. As an overabundance of precaution for pleading purposes, and to address the objections of the defendants pursuant to Rule 8(a)(2), the plaintiff further sets out in each specific Count below the wrongful conduct of each individual defendant and how that conduct injured the plaintiffs.

9. Upon information and belief, defendant/owner as described above, SWIB, may have sold or transferred title or assigned the ownership of Westfield Village Apartments which includes 51111 [*sic*] Woodmere Drive, Centreville, Virginia 20120. Upon further discovery in this case, and depending upon whether liability for claims during the relevant periods herein have been transferred and accepted by a new owner pursuant to a recent sale, will determine if additional defendant or defendants will be named.

10. Plaintiff, Christophe Roche and Juanita Roche, signed a Lease with the owner who they believed to be Lincoln Property, for 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (hereinafter this location will be referred to as "the Roche apartment").

11. The above-described Lease sets forth the terms and obligations of the parties to the Roche apartment.

12. The defendant Lincoln is engaged in the real estate investment and/or property management business and trade under the various names.

13. The defendants Lincoln and SWIB at the time of the occurrence in question, and upon information and belief, currently manage and own, respectively, Westfield Village Apartments located in Fairfax County, Virginia, as described above.

14. Roche and his family leased an apartment in the complex (Unit 104) from the defendant, Lincoln, in which the Lease stated that SWIB was the owner, acting as agent for Lincoln (the Lease signature page speaks for itself in this regard).

15. Plaintiffs were a residents/tenants at Westfield Village during all relevant times and gave numerous notifications of the problems that are described below.

16. SWIB breached the Lease by ignoring the notifications of moisture damage which resulted in the formation of toxic mold that adversely affected the personal property and health of the Roche family. The notifications were given to Lincoln, the property managers of the apartment complex, which company (Lincoln) owed the duty of due care to the plaintiffs to maintain the premises.

17. For months, the Roche family advised Lincoln of water leaks that needed repairing. Holes had been cut in the walls of his apartment by the landlord that needed to be repaired, along with carpet that had been torn up, and the fact that mold was all over his apartment was brought to Lincoln's attention.

18. Numerous requests were made for rectifying this problem, and most of the notices were personally given by Roche. In addition to written letters, all of the warnings of the mold problems were disregarded by defendant Lincoln as property manager, and defendant SWIB as owner.

19. Lincoln held itself out through its advertisements and inducement to prospective residents that they "provide exemplary service in a quality home environment," and which inducement was the primary and material reason why Roche entered into the Lease. Lincoln had advertised that they provided 24 hour technical maintenance service, and had in effect a same-day service request policy. The apartment brochure advertisement set out what the prospective tenants' expectations were under a heading "YOUR EXPECTATIONS," and stated, "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee, ..."

20. Due to the failures and breach of its duties, as described below, Roche and his family, including a six year-old son, have been personally injured, as further described below.

21. The plaintiff has suffered injuries in connection with the exposure to the toxic mold and has been treated by physicians for these injuries, all caused by the breach of duties owed by Lincoln.

22. SWIB as owner of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment, including but limited, as follows:

a. In failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits.

b. In failing to inspect the apartment to determine if it was subject to water damage, mold damage, excessive moisture, etc.

c. In failing to provide Roche's family with a safe place to live;

d. In failing to adequately inspect the apartment for defects in the heating and air conditioning units and in the substrate duct material as well as condensation drain lines and filtration systems employed by the HVAC.

e. In providing, operating and maintaining the apartment in question with unsafe conditions, namely; recalled polybutylene water piping throughout the entire building. Through research, the pipes were known to rupture and cause massive water damage. As a result, older appliances such as washers, dryers, refrigerators, and dish washers were rusted out and leaking, leading to failure. Roche's washing machine water pump malfunctioned and flooded the apartment.

f. In providing, operating and maintaining the apartment with the knowledge, actual or constructive, that the apartment contained unsafe molding exposure and toxins, including Stachybotrys chartarum, Aspergillus, Penicillium, and other fungus species, which all contained dangerous levels of micro toxins.

g. In failing to repair and replace the unsafe conditions in the apartment.

h. In failing to provide prompt or reasonable maintenance in situations where service requests were placed with the office as promised by advertising and the lease agreement to the Roche family. Emergency calls, such as leaks, were ignored despite their urgency, and in contrast to the lease that warranted twenty-four hour service would be available for emergencies.

23. Each of the above acts and omissions, singularly and in combination with others, constitute a common law and/or statutory negligence that proximately caused the toxic mold in question and the resulting damage, injuries, and destruction of property owned by the plaintiff and her family.

24. The conduct of the defendants constitutes gross negligence. This conduct also constitutes a heedless and reckless disregard and a conscious disregard of the rights of Roche and his family, and involves such an entire want of care as to indicate that it was the result of a conscious disregard of their rights, welfare and safety.

25. Further, Roche cannot more specifically allege the acts of negligence on the part of the defendants herein that proximately caused the condition to exist in question for the reason the facts in that regard are peculiarly within the knowledge of the defendants. In the alternative, in the event the plaintiff is unable to prove specific acts of negligence, plaintiff relies upon the doctrine of *res ipsa loquitur*. In this connection, Roche would show that the maintenance and operation of the apartment in question were within the exclusive control of the defendants. Plaintiff had no means of ascertaining the method or manner in which the apartment was maintained. The occurrence causing harm to the plaintiff, as described above, was one which, in an ordinary course of events, would not have occurred without negligence on the part of the defendants. Consequently, defendants were negligent in providing and maintaining the apartment in question,

which negligence was a proximate cause of the damages, injuries and losses sustained by the plaintiff, as set out more fully below.

26. As a result of exposure to toxic mold caused by the negligence of Lincoln, Mr. and Mrs. Roche have suffered chronic migraine headaches and sinus headaches, chronic fatigue, lack of energy, dizziness, vertigo, forgetfulness, confusion, lack of concentration, stomach aches, constipation and diarrhea, blurred vision, ear pain, restless sleep, body aches, difficulty breathing, cough, burning, cramps, chest pain, swollen glands in the neck and throat, loss of dexterity and/or coordination, chronic fatigue, burning eyes and eye pain.

27. The Roche family were exposed to toxic mold for approximately one year, from March 2001 until 2002, when they were required to evacuate their apartment.

28. The Roche family was unaware of this exposure to the toxic molds, including Stachybotrys Chartarum until a Mold Investigation Report by Potomac Environmental Testing Services of Germantown, Maryland, was conducted and a report was received in March of 2002 at the Roche family's request and expense. That report stated that there was a significant amount of past water leakage, and that this is the cause of the toxic mold growth and contamination that occurred in the apartment, and that the level of contamination was extensive.

29. The occupants of Unit 104, which was the apartment leased by Roche and her family, were continuously and repeatedly exposed to toxic fungal spores during their period of occupancy. As a result of the exposure to these toxins, the Roches developed physical symptoms of cough, sore throat, and neurological deficits which permanently have weakened their concentration and brain processing capabilities.

30. Roche is 32 years old, and his wife, Juanita Roche, is a 23 year old pre-school teacher, and were in general good health.

31. The Roche family, including their 6 year old son, has been subjected to anxiety not only due to their health concerns, but also because of stress from the loss of virtually all of their worldly possessions including many sentimental items, and disruption of their day-to-day life. This was caused by the exposure to the toxic mold proximately caused by the defendants' acts.

32. As a result of the above negligence of the defendants, the Roche family has been caused great inconvenience, including what amounts to a constructive eviction.

33. The Roche family was forced to move out of their apartment and was placed temporarily in another property managed by Lincoln. That property also was contaminated with toxic mold. The temporary property within "The Village at Potomac Falls," was the guest suite of the complex and was the Roche family's home for approximately a month and a half. A week after moving in, Mr. Roche was confronted by Vernon Tatem, an employee of Lincoln Property and was asked to allow Tatem to enter his unit for contracted work. In Roche's unit they entered a water closet in which access is restricted to residents by a lock. Upon unlocking and entering the water closet Mr. Roche noticed the room was infiltrated with the same mold as the old apartment, brought on by severe water damage from the hot water over flow pipes leaking inside the closet. Upon further investigation, it was discovered that a number of units throughout that property had the same problem as well as discovering fire sprinkler control rooms with the problem as well. Upon witnessing the mold in the room, the contractor who was sent to repair the walls and remove the mold, looked at it, and warned Mr. Roche to stay back from the mold and not to breathe it and stated "Don't get near it, its bad news, it can cause pneumonia and other bad stuff".

34. While the Roche family was temporarily moved to the Village at Potomac Falls, the family's pet dog and cat had to be placed in a kennel, and appeared to be affected by the toxins as they lost hair, weight, and energy. The

family was displaced from March 10, 2002, up and to the present, without their personal clothing, furnishings, and belongings.

35. The concealment from residents of exposure to dangerous levels of toxins is and has been a conscious and predetermined plan on the part of Lincoln.

36. For the year 2001, Lincoln managed other properties in Northern Virginia and in this region, in which they were aware of the dangerousness of toxic mold. Lincoln had a written policy that was in effect at all times relevant herein, that warned their employees of the need to immediately address discovery of mold in its commercial rental properties and to take prompt action. Notwithstanding this Lincoln written policy, they ignored it in the instant case concerning the Roche family and continued a course of concealment of this highly dangerous condition from residents at their other rental properties owned or managed by Lincoln or its wholly owned subsidiaries or investment assignees.

37. During the same relevant time period, or just immediately prior thereto, Lincoln was managing Summit Village Apartments (now known as Rosslyn Heights) located in Arlington, Virginia. Moisture problems in the apartments were brought to Lincoln's attention, and tests were conducted to determine if there had been formation of toxic molds. After getting the results of the test, Lincoln went on a course of intentional concealment of this information from the residents at Summit Village, telling the residents there that they were fixing air conditioning units in closets without disclosing to them that the tenants themselves had been exposed to toxic spores. Even as of this date, upon information and belief, those tenants are unaware of the dangerous condition created, and upon information and belief, may be suffering from health conditions and complications due to the exposure to the toxic molds. It is estimated that approximately 55 tenant families at Summit Village, now known as Rosslyn Heights, have been exposed and may suffer from the same

conditions as Roche and his family, and may have been seeking medical treatment, not aware that it was caused by the toxins due to mold formation. Lincoln went on a course to advise all of its staff to strictly keep confidential this information from the tenants, and even had a policy of only going into the apartments to remediate at Summit Village when tenants were not at home.

38. This course of deceptive conduct was the same that they subjected the Roche family to, and others at Westfield Village.

39. When the Roche family was temporarily removed to another Lincoln property, The Village at Potomac Falls, the same deception continued, as described above. Vernon Tatem approached Mr. Roche and was asked to please remain quiet about entering the unit, since he was not authorized to inform Mr. Roche about the entering. After a month's period of residency, it was disclosed that Lincoln's upper management was aware of the mold problems as Cheryl Bel-Dean called Mr. Tatem and Peter Moriba to a meeting to instruct them to conceal the mold problems on the property, including in Roche's unit. Ms. Bel-Dean informed the men that a very large lawsuit could be filed against Lincoln. Melvin Bryant and Jon LeBeau, a Lincoln executive officer, were also aware of the mold problem at the temporary residence. Misters Mariba and Tatum felt their jobs would be in jeopardy if they mentioned anything about the mold. Within three days of Mr. Roche filing a grievance for arbitration with Lincoln concerning his employment, Mr. Tatem was fired from his position. Later, Mr. Peter Mariba, was terminated. The carpet contractor who warned Mr. Roche about the mold, was removed from all contracts on the property for sharing information about the mold condition.

40. Upon information and belief, maintenance personnel and staff of Lincoln have also been exposed to the toxins, with Lincoln's knowledge, and they have suffered similar consequences as the Roche family, but Lincoln has

concealed this information from their own employees. Lincoln technicians have been unwittingly subjected to dangerous levels of toxins at Summit Village (now known as Rosslyn Heights), where the units there were classified into 5 different levels of hazardous exposure. But Lincoln's maintenance staff were not advised as to the known levels they were exposed. [Outside contracting work crews performing remediation wore fungicidal protective full body and glove coating and suits in the units. Lincoln employees were given no protective suits or told of the hazards; these same toxins are utilized as chemical and biological warfare agents because of their human destructive capability.]

41. Mr. Roche was employed by Lincoln in December of 2001.

42. As a result of Mr. Roche placing his landlord and now his employer on notice of the mold conditions in his own unit (he did not how that the toxins were in existence prior to his job with Lincoln), he was ostracized in his employment.

43. They transferred him from his normal work position and gave him an adverse employment transfer. Mr. Roche was moved to a new location for work in The Village at Potomac Falls, at which point he began to be stripped of his benefits such as sick leave, health benefits, and others. Once the mold issue became prevalent at The Village at Potomac Falls, Mr. Roche was moved to other smaller properties. Mr. Roche would be sent to perform work at a complex and upon arriving they would inform him that no work was needed. Mr. Roche would then be made to wander the properties picking up litter, which was not in his job's duties. Eventually Mr. Roche was sent to Ashburn Meadows where he continued to be given tasks such as trash removal, light bulb changing, and painting parking curbs. Employees were also instructed not to communicate with Mr. Roche.

44. Mr. Roche brought to the attention of Lincoln the treatment he was receiving and the adverse discrimination caused by the fact that he exercised his rights to live in a safe level toxin-free apartment. Lincoln terminated Mr. Roche under a pretext.

45. Lincoln proximately caused defamatory statements and adverse employment actions against Mr. Roche as described.

46. The above-described acts were intentionally caused by Lincoln, resulting in emotional distress and further complications to Mr. Roche's health.

46(a). Under the theory of *respondeat superior*, "SWIB", as the principal, is accountable for all of the wrongdoings and breaches by its agent, Lincoln.

47. As a result of the exposure to the toxins, the Roche family's personal property has been destroyed, lost or taken away. This has amounted to a conversion of Roche's property. This loss totals over $165,000.00 in personal property loss, including their automobile, and does not even include the sentimental loss of such things as wedding gifts, momentos, photos, precious and priceless items to the family, including but not limited to all photographs of children, first lost teeth, Ms. Roche's wedding dress, wedding photos, every home video, all original school work of children over their lives, medical records, birth certificates, social security cards, school and health records, financial documents, sentimental stuffed animals and hand made items, engagement rings, gifts, diplomas and degrees, awards and other important documents.

48. The Roche family has suffered medical expenses caused by the exposure to the toxins, and will continue to suffer medical expenses in the future to treat his injuries, including serious breathing difficulties, memory and hearing loss, dizziness, flu-like symptoms, and lung scarring caused by the airborne toxins, known as mycotoxins.

49. The personal injuries and brain damage caused by the defendants to plaintiffs are permanent and debilitating. The plaintiffs have been placed on daily medication, in the past and for the future, to treat lungs, skin disorders, memory loss, mental distress, and suffered

inconvenience, caused by living out of suitcases and uncertain locations.

50(a). All of the above allegations are relevant to all the below Counts and to issues of damages, both compensatory and exemplary, and are incorporated by reference in each one of the below listed Counts, as if fully set forth and re-alleged therein.

50(b). There is an statutorily imposed warranty in the Virginia Landlord-Tenant Act that requires this residential lease to have a warranty for fitness and habitability. ("Keep the premises in a fit and habitable condition"; comply with applicable building and housing codes materially affecting health and safety; maintain in good and safe working order facilities and appliances, all pursuant to Virginia Code Section 55-248.13, as amended.)

50(c). The Virginia Landlord-Tenant Act and other statutory law do not permit a lease to exclude the statutory warranties, which are made a part of every residential lease by law. (Virginia Code Section 55-248.9 prohibits limitation or waiver of the statutorily imposed warranties, and makes any lease provision attempting to do so "unenforceable.")

50(d). The conduct of defendant Lincoln was "outrageous or intolerable" conduct for the following reasons:

i. The acts done by defendant, Lincoln, were intentional. Lincoln sent from Texas an executive vice president to deal with the problems that the Roche family outlined. Instead of intending to address the problems, the executive vice president tried to intimidate the Roche family by trying to convince Mr. Roche that he had no claim and that it had to go through arbitration. The corporate executive further carried out a plan to pressure Mr. Roche to give up his employment and his position, all part of a scheme to discredit and ostracize and cover up the wrongs of defendant Lincoln.

ii. Defendant, Lincoln, in furtherance of the cover-up, instructed its own employee and staff not to disclose the hazards and toxic exposure that the Roche family was facing.

iii. At the relevant times while these complaints were being made by the Roche family, defendant, Lincoln, was exercising a secret plan to hide from other tenants at another Northern Virginia apartment complex the same hazardous condition and toxic exposures. Defendant, Lincoln, had instructed its staff to hide from residents the fact that they were fixing air conditioning units when in fact they were remediating toxic mold exposure caused by moisture damage. They even hid from some of their own employees and staff that they were working amongst, and cleaning up, toxic material without providing them the standard and industry accepted protective clothing and directives.

iv. When defendant, Lincoln, moved the Roche family to another location, that second location also had toxic mold, and the defendant, Lincoln, knew it. It intentionally went on a course to keep this secret from the Roche family and pressured and ostracized its own staff if they should reveal any of this information to the Roche family. For the second time they had placed the Roche family into a toxic mold condition and concealed the hazards from this family.

50(e). As described above, severe mental distress, including brain damage by affecting memory, and physically causing skin lesions, and severe physical ailments were suffered by the plaintiff as a result of the intentional acts by defendant, Lincoln.

50(f). All the above malfeasance and misfeasance acts of defendant Lincoln were done intentionally and with reckless disregard of the rights of the plaintiffs, justifying an award of punitive damages. The conduct of intention-

ally concealing from residents a known hazardous condition affecting health and well-being, and the insensitive manner of dealing with it, further justifies an exemplary damage award.

50(g). The acts attributed to defendant Lincoln were done in a willful and wanton disregard of the plaintiff's rights. The scheming and the subterfuge and intentional actions described above evinces a conscious disregard of the rights of others, and justify punitive damages where requested below. Specifically alleged above are actions of intentionally concealing from the public a policy of hiding toxic mold from residents in its own property-managed apartment complexes, and a scheme to hide from residents, its staff and others, the dangerousness of the conditions shown and created by the defendant, Lincoln, and defendant, "SWIB." Specifically, defendant, Lincoln, (i) harassed and ostracized and intended to destroy Mr. Roche's occupation and employment with defendant, Lincoln; (ii) had a plan amongst its executives to conceal hazardous conditions, as described above; (iii) acted intentionally and wantonly towards the plaintiff in addressing the problems described. Generally accepted principles of decency and human behavior would indicate that this is a conscious disregard of the rights of others, including the plaintiff.

COUNT I

(Negligence ~ *Per se* – Lincoln and SWIB)

51. Plaintiff incorporates herein by reference Paragraphs 1 through 50 above.

51(a). Specifically, Lincoln breached its duty to maintain the apartment. Defendant, Lincoln, held itself out to the public as the ostensible owner, operator and maintainer of the premises. Its brochures and advertisements claimed as such. It told the public that it would provide a first-class service and attention to defects brought to its attention.

51(b). Upon information and belief, Lincoln has a contract with the owner or an agreement that it would

provide the maintenance of the apartment complex in issue here.

51(c). Defendant Lincoln specifically had a duty to use due care to maintain the apartment so as to not injure the plaintiffs' property and persons. (Both a principal and agent can be held liable under Virginia common-law). The Defendant Lincoln engaged in the wrongful conduct set forth in paragraph 53 below.

52. Defendant, "SWIB" as owner of the property, is accountable for breaching its duties in having its agent, Lincoln Property, manage the property in a defective manner. As the owner, it had common-law duty of due care owed to the plaintiff, and it breached this duty and caused injury, as described above. It's [*sic*] duties are set forth in the Lease, Virginia statutory law, and common law. (In Virginia there is a duty to use ordinary care to keep premises in a reasonably safe condition, and this duty cannot be delegated: *Love v. Schmidt*, 239 Va. 357, 389 S.E.2d 707 (1990).

53. The defendant Lincoln, as the owner's agent for property management, breached SWIB's aforementioned duty and was negligent in its maintenance of the apartment. Specific acts of negligence include, but are not limited to, the fact that they:

a. Failed to keep the apartment free from toxic material and in a livable condition, as required under the Lease, and specifically, pertaining to the requirement that they prevent dilatory intrusion of water through the walls and coverings and to prevent leakage;

b. Failed to adequately respond to notification and failure to determine the character, quality and damage and hazardous conditions in existence upon notification;

c. Failed to adequately repair known leaks that resulted in formation of mold from water infiltration throughout the areas of the apartment;

d. Failed to select an appropriate remediation system that would adequately and properly keep the apartment waterproof and free from water intrusions;

e. Failed to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with, and in conformity with, industry standards and applicable Building Codes;

f. Failed to detect errors and failures in workmanship and quality of their repairs;

g. Accepted and approved defective and/or nonconforming materials and/or labor;

h. Provided deficient workmanship and/or defective materials without proper inspection to ensure that the work was correct and in conformity with customary industry standards in accordance with the landlord/tenant obligations at common law and under the Lease and failed to follow their own policies and instructions and specifications to correct such defects;

i. Failed to adequately waterproof and properly maintain the premises which would not allow moisture and infiltration into the interior of the structure;

j. Failed to replace defective pipes in a system that was known at the time to be defective and in need of replacement, the pipes being constructed of polybutylene, a material that the defendants knew should have been replaced in all of the structured apartments because of the industry standard concerning these pipes;

k. Failed to guard against the negligent acts of subcontractors;

l. Failed to correct defective conditions;

m. Failed to report the failure of installation to comply with manufacturer and other specifications; and

n. Committed other acts of negligence and breaches of the applicable Building Code and landlord/tenant obligations which may be revealed through discovery.

54. It was reasonably foreseeable that the aforementioned acts of negligence would damage the plaintiffs.

55. The Landlord/Tenant Act and Building Code and industry standards referenced above were enacted for public safety.

56. The plaintiff belongs to that class of persons whose benefit the referenced Code and industry standards were enacted.

57. As a direct and proximate result of the defendant Lincoln's wrongful acts and negligence, the plaintiffs have suffered damages to their property and their persons, including permanent damage to their brains, in the amount of Ten Million and no/100 Dollars ($10,000,000.00), or according to proof at trial, plus interest. Defendant SWIB is accountable for all these same wrongful acts of its agent Lincoln, and because it breached its common law duty to plaintiffs to use ordinary care to keep the apartment in a reasonably safe condition.

COUNT II

(Breach of Lease - SWIB)

58. Plaintiff incorporates herein by reference Paragraphs 1 through 57 above.

58(a). The defendant "SWIB" as owner is held accountable for the reasons expressed and incorporated above.

59. Pursuant to the Lease between the SWIB and Roche, the defendants provided a statutorily imposed warranty with respect to their duties to properly maintain the referenced premises.

59(a). Under paragraph 18 of the Lease, owner, "SWIB" agreed to act with reasonable diligence to maintain fixtures, heating and/or air conditioning equipment, and to remain in substantial compliance with applicable state [includes the Virginia Residential Landlord and Tenant Act] and local laws regarding safety and sanitation and to make all reasonable repairs. This express warranty in the Lease was breached for the reasons described above.

60. As set forth herein, the apartment contained numerous latent defects which the plaintiff had no knowledge at the time he entered into the Lease, including but not limited to, the piping that was defective, and the air conditioning units, and the installation of such was of such poor quality, and not free from faults and defects, including, but not limited to leaky piping and HVAC, and heating and air conditioning units, and rotting out drywall, and all was not in accordance with good construction practices. The latent problems and defects, unknown to Roche, occurred and manifested within the applicable warranty period.

61. By its promises to the plaintiffs to repair the defects the defendant SWIB committed itself to honor its warranty obligations in the Lease.

62. By reason of the defects and defective condition and activities as described herein, and the spreading of toxic mold causing toxins and spores of dangerous toxins to spread throughout the apartment, and through its own testing, the defendant, "SWIB," and its agent, defendant Lincoln, breached its express warranties to the plaintiff.

63. The plaintiff had notified the defendant, Lincoln, (Lincoln was the property manager and agent for the owner SWIB) of the defective condition of the apartment and the breaches of the express warranties, but the defendant, "SWIB" and its agent, Lincoln, failed to perform necessary remedial activities to correct these defects in a timely manner.

64. By reason of its failure to repair or replace the aforementioned defect in a timely manner, the defendant, "SWIB" breached its duty to repair under the Lease. Plaintiff has met all conditions precedent to recover under this warranty.

65. By reason of the defendant SWIB's breach of its lease duties, plaintiff has suffered property damages in the amount of at least $160,000.00 or according to proof at trial, plus interest.

COUNT III

(Breach of Implied Warranties - SWIB)

66. The plaintiff incorporates herein by reference Paragraphs 1 through 64 above.

66(a). Defendant SWIB warranted that as landlord it would provide a reasonably safe premises. This common law duty is an implied warranty under Virginia case law as set forth in *Love v. Schmidt*, 239 Va. 357, 389 S.E.2d 707 (1990).

[66(b). Not Included in Original]

66(c). Defendant Lincoln, as agent for SWIB, specifically breached its duty to perform its maintenance work in a workmanlike manner. The specific wrongful act of SWIB was in not addressing the defect upon notification; intentionally concealing their non-performance; and intentionally doing all the wrongful acts described above. They did this by and through their agent Lincoln, and Lincoln's staff on the premises, and the staff at the regional offices.

67. Also, by operation of law by way of the Virginia Landlord Tenant Act, the defendant impliedly warranted that the apartment would be habitable and free from toxic and dangerous materials.

[68. Not Included in Original]

69. Defendant SWIB breached this warranty in that the work was not of a workmanlike quality prevailing at the time and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

70. Roche, who leased the apartment only approximately 12 years after it was built, did not and could not by reasonable inspection, have discovered the defects from said breaches of the warranties of habitability and workmanship at the time they leased the apartment, and when they did discover these at the very inception of their Lease, brought them to the attention of Lincoln, but no action was taken to correct the same.

71. By reason of defendant SWIB'S breach of its implied warranties, plaintiff has suffered property damages in the amount of $160,000.00 plus interest, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT IV

(Conversion - Lincoln)

72. Plaintiff incorporates Paragraphs 1 through 71 herein as if fully set out.

73. Defendant Lincoln converted the personal property of Roche in the manner described in paragraph 47 and by dispossessing Roche from his property without his consent and against his interests; and by destroying or losing property of Roche; and by wrongfully withholding property.

73(a). Lincoln took the plaintiffs' personal belongings from his apartment, advising that these items had been contaminated and had to be removed. These items have been lost or destroyed by the Lincoln after Lincoln took possession of them from the plaintiffs' apartment.

74. The conversion of Roche's personal property is approximately $250,000.00, of which $160,000.00 is for replacement cost for items destroyed by exposure to the toxic mold spores, and the other loss of priceless sentimental and other items that could never be replaced, such as gifts, mementos, wedding memorabilia, and as described above.

WHEREFORE, the Plaintiff, Christophe Roche, requests judgment in the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) for conversion of his personalty.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

CHRISTOPHE ROCHE
By Counsel

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[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Jan. 6, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S ANSWER TO SECOND AMENDED COMPLAINT

Defendant Lincoln Property Co. ("Lincoln"), by and through undersigned counsel, hereby states as follows for its Answer to Plaintiff's[1] Second Amended Complaint (hereinafter the "Complaint"):

1. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 1 of the Complaint, and therefore denies the same.

[1] To the extent that this Answer refers to "Plaintiff," that term shall mean Plaintiff Christophe Roche. Although Juanita Roche is named in the caption of the Second Amended Complaint (the "Complaint") as a plaintiff, she makes no factual allegations, nor does she assert any claims or make any prayers for relief against Lincoln. Moreover, the Complaint is signed only by the Attorney for Christophe Roche. To the extent that Juanita Roche seeks to make or assert any allegations, claims and/or prayers for relief, Lincoln reserves the right to amend its Answer accordingly.

2. Lincoln admits the allegations of Paragraph 2 of the Complaint.

3. Lincoln admits the allegations of the first sentence of Paragraph 3 of the Complaint. Lincoln admits that it develops and manages residential communities. Lincoln admits that it manages Westfield Village, which is located in Fairfax County, Virginia. Lincoln denies each and every other allegation of Paragraph 3 of the Complaint.

4. Lincoln admits that it manages residential properties in approximately 19 states. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning whether it is one of the "most diversified" real estate firms in the United States and whether it has a "presence" in "over 100 markets," and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 4 of the Complaint.

5. Lincoln admits that, by and through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, it has managed Westfield Village Apartments since 1996. Lincoln denies each and every other allegation of Paragraph 5 of the Complaint.

6. Lincoln admits the allegations of Paragraph 6 of the Complaint.

7. Lincoln admits that it advertised in newspapers and in realtor brochures that it was the property manager of Westfield Village Apartments and that it was the owner and/or property manager of other apartment complexes in the Northern Virginia region. Lincoln denies each and every other allegation of Paragraph 7 of the Complaint.

8. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what lessees, including Plaintiff, knew or whether and the extent to which their dealings were exclusively through the offices and staff of Lincoln, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 8 of the Complaint.

7(b). Lincoln admits the allegations of Paragraph 7(b) of the Complaint.

8. Lincoln denies the allegations of the second Paragraph 8 of the Complaint.

9. Lincoln denies the allegations of Paragraph 9 of the Complaint.

10. Lincoln admits that Christophe Roche and Juanita Roche signed a lease with SWIB to lease an apartment at 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (the "Roche Apartment"). Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what Christophe and Juanita Roche believed, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 10 of the Complaint.

11. Lincoln admits the allegations of Paragraph 11 of the Complaint.

12. Lincoln admits that it is engaged in the real estate investment and/or property management business. Lincoln denies each and every other allegation of Paragraph 12 of the Complaint.

13. Lincoln admits that it currently manages Westfield Village Apartments on behalf of its owner, SWIB. Lincoln admits that throughout the plaintiff's tenancy of the Roche apartment, it managed Westfield Village Apartments on behalf of its owner, SWIB. Lincoln admits that Westfield Village Apartments is located in Fairfax County, Virginia. Lincoln denies each and every other allegation of Paragraph 13 of the Complaint.

14. Lincoln admits that Plaintiff and his family leased the Roche Apartment and admits that the lease stated that SWIB was the owner of Westfield Village Apartments. Lincoln denies each and every remaining allegation of Paragraph 14 of the Complaint.

15. Lincoln admits that Plaintiff and his family were residents/tenants at Westfield Village from August 1998 to May 1999 and from March 2001 to May 2002. Lincoln

admits that Plaintiff was a resident/tenant of Westfield Village. Lincoln denies each and every other allegation of Paragraph 15 of the Complaint.

16. Lincoln denies the allegations of Paragraph 16 of the Complaint.

17. Lincoln admits that, from time to time, Plaintiff advised Lincoln of conditions that needed repair in the Roche Apartment. Lincoln avers that, each time Plaintiff requested a repair, it promptly performed the repair. Lincoln admits that, at one point, a Lincoln service employee and/or a contractor cut holes in the Roche Apartment's drywall in connection with service to the apartment. Lincoln admits that, in January 2002, Plaintiff notified Lincoln for the first time that there was mold in his apartment. Lincoln denies each and every other allegation of Paragraph 17 of the Complaint.

18. Lincoln admits that, from time to time, Plaintiff advised Lincoln of leaks in the Roche Apartment. Lincoln denies each and every other allegation of Paragraph 18 of the Complaint.

19. Lincoln admits that its advertisements for Westfield Village included the statement that it strives to provide exemplary service in a quality home environment, that it provides 24-hour technical maintenance service to respond to emergencies, and that it has a "same-day" service request policy. Lincoln admits that the apartment brochure included the heading "Your Expectations," and elsewhere stated "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee. . . ." Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the "primary and material" reason why Roche entered into the Lease, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 19.

20. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff and/or his family, and therefore

denies same. Lincoln denies each and every other allegation of Paragraph 20 of the Complaint.

21. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning injuries allegedly suffered by Plaintiff and/or his family and the medical treatment received therefor, and therefore denies same. Lincoln denies each and every other allegation of Paragraph 21 of the Complaint.

22. Lincoln denies the allegations of Paragraph 22 of the Complaint and all subparts thereof.

23. Lincoln denies the allegations of Paragraph 23 of the Complaint.

24. Lincoln denies the allegations of Paragraph 24 of the Complaint.

25. Lincoln denies the allegations of Paragraph 25 of the Complaint.

26. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff or his wife, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 26 of the Complaint.

27. Lincoln denies the allegations of Paragraph 27 of the Complaint.

28. Lincoln denies the allegations of Paragraph 28 of the Complaint.

29. Lincoln denies the allegations of Paragraph 29 of the Complaint.

30. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 30, and therefore denies the same.

31. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of alleged health concerns and anxiety suffered by Plaintiff and his family, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 31 of the Complaint.

32. Lincoln denies the allegations of Paragraph 32 of the Complaint.

33. Lincoln admits that the Roche family moved from the Roche apartment. Lincoln admits that it provided alternative housing, free of charge, to the Roche family during this relocation at the guest suite at the Village at Potomac Falls, another property managed by Lincoln. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of confrontations Plaintiff may have had with Vernon Tatem, alleged discoveries made by Plaintiff, or alleged conversations between an unidentified "contractor" and Plaintiff, and therefore denies same. Lincoln denies each and every other allegation of Paragraph 33 of the Complaint.

34. Lincoln admits that it provided housing free of charge for Plaintiff and his family at the Village at Potomac Falls, which is managed by Lincoln. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning the living arrangements, health and relative energy levels of Plaintiff's dog and cat, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 34 of the Complaint.

35. Lincoln denies the allegations of Paragraph 35 of the Complaint.

36. Lincoln admits that, in 2001, Lincoln managed properties in Northern Virginia, in addition to Westfield Village. Lincoln admits that it had a written policy in place at that time instructing employees how to address mold in its residential rental properties. Lincoln denies each and every other allegation of Paragraph 36 of the Complaint.

37. Lincoln admits that in 2001, Lincoln managed Summit Village Apartments, now known as Roslyn Heights, located in Arlington, Virginia. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the level of awareness possessed by any of its tenants, and therefore

denies the same. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the state of health of its tenants, and therefore deny [*sic*] the same. Lincoln denies each and every other allegation of Paragraph 37 of the Complaint.

38. Lincoln denies the allegations of Paragraph 38 of the Complaint.

39. Lincoln admits that it temporarily provided Plaintiff and his family with housing free of charge at the Village at Potomac Falls. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning Mariba and Tatem's subjective feelings regarding job security, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 39 of the Complaint.

40. Lincoln admits that certain employees of a contractor who performed work at Summit Village wore task-specific protective clothing. Lincoln denies each and every other allegation of Paragraph 40 of the Complaint.

41. Lincoln admits the allegations of Paragraph 41 of the Complaint.

42. Lincoln denies the allegations of Paragraph 42 of the Complaint.

43. Lincoln admits that, as part of his regular duties as a floating technician for Lincoln, Plaintiff was assigned to work at various properties in Northern Virginia, including the Village at Potomac Falls and Ashburn Meadows. Lincoln denies each and every other allegation of Paragraph 43 of the Complaint.

44. Lincoln admits that Plaintiff complained to Lincoln about his perception that he was being mistreated as an employee. Lincoln admits that it terminated Roche's employment on August 16, 2002. Lincoln denies each and every other allegation of Paragraph 44 of the Complaint.

45. Lincoln denies the allegations of Paragraph 45 of the Complaint.

46. Lincoln denies the allegations of Paragraph 46 of the Complaint.

46(a). Lincoln denies the allegations of Paragraph 46(a) of the Complaint.

47. Lincoln denies the allegations of Paragraph 47 of the Complaint.

48. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any past, present or future medical expenses the Roche family has allegedly incurred or will incur, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 48 of the Complaint.

49. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations containing any medical conditions Plaintiff or his family allegedly have suffered or may suffer, including what medications they may have been prescribed, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 49 of the Complaint.

50(a). Lincoln's responses to the allegations contained in Paragraphs 1-49 are incorporated herein by reference.

50(b). Lincoln states that Paragraph 50(b) contains a conclusion of law, which Lincoln need not admit or deny. Answering further, Lincoln states that the Virginia Landlord-Tenant Act speaks for itself.

50(c). Lincoln states that Paragraph 50(c) contains a conclusion of law, which Lincoln need not admit or deny. Answering further, Lincoln states that the Virginia Landlord-Tenant Act and other statutory laws speak for themselves.

50(d). Lincoln denies the allegations of Paragraph 50(d) and all subparts thereof.

50(e). Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any medical conditions Roche or his family allegedly have suffered or may suffer, and therefore denies

the same. Lincoln denies each and every other allegation of Paragraph 50(e).

50(f). Lincoln denies the allegations of Paragraph 50(f).

50(g). Lincoln denies the allegations of Paragraph 50(g).

COUNT I (Negligence *Per se* – Lincoln and SWIB)

51. Lincoln's responses to the allegations contained in Paragraphs 1-50(g) are incorporated herein by reference.

51(a). Lincoln admits that it held itself out to the public as the property manager of Westfield Village Apartments. Lincoln denies each and every other allegation of Paragraph 51(a).

51(b). Lincoln admits that it has a contract to provide management services for Westfield Village Apartments. Lincoln denies each and every other allegation of Paragraph 51(b).

51(c). Lincoln states that Paragraph 51(c) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 51(c).

52. Lincoln states that Paragraph 52 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 52.

53. Lincoln denies the allegations of Paragraph 53 of the Complaint and all subparts thereof.

54. Lincoln denies the allegations of Paragraph 54 of the Complaint.

55. Lincoln states that Paragraph 55 states a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 55.

56. Lincoln states that Paragraph 55 [*sic*] states a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 56.

57. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 57 of the Complaint. Lincoln denies each and every other allegation of Paragraph 57 of the Complaint.

COUNT II (Breach of Lease – SWIB)

58. Lincoln's responses to the allegations contained in Paragraphs 1-57 are incorporated herein by reference.

58(a). Lincoln admits that SWIB is the owner of Westfield Village. Answering further, Lincoln states that Paragraph 58(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 58(a) of the Complaint.

59. Lincoln states that Paragraph 59 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 59 of the Complaint.

59(a). Lincoln states that the lease speaks for itself. Answering further, Lincoln states that Paragraph 59(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 59(a) of the Complaint.

60. Lincoln has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning what Plaintiff knew or did not know when he entered into the lease for the Roche Apartment, and therefore denies the same. Lincoln denies each and every other allegation of Paragraph 60 of the Complaint.

61. Lincoln denies the allegations of Paragraph 61 of the Complaint.

62. Lincoln denies the allegations of Paragraph 62 of the Complaint.

63. Lincoln denies the allegations of Paragraph 63 of the Complaint.

64. Lincoln denies the allegations of Paragraph 64 of the Complaint.

65. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 65 of the Complaint. Lincoln denies each and every other allegation of Paragraph 65 of the Complaint.

COUNT III (Breach of Implied Warranties - SWIB)

66. Lincoln's responses to the allegations contained in Paragraphs 1-65 are incorporated herein by reference.

66(a). Lincoln states that Paragraph 66(a) contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 66(a) of the Complaint.

[66(b). Not Included in Original]

66(c). Lincoln denies the allegations of Paragraph 66(c).

67. Lincoln states that Paragraph 67 contains a conclusion of law, which Lincoln need not admit or deny. Lincoln denies each and every other allegation of Paragraph 67 of the Complaint.

[68. Not Included in Original]

69. Lincoln denies the allegations of Paragraph 69 of the Complaint.

70. Lincoln denies the allegations of Paragraph 70 of the Complaint.

71. Lincoln denies the appropriateness and validity of the relief requested in Paragraph 71 of the Complaint. Lincoln denies each and every other allegation of Paragraph 71 of the Complaint.

COUNT IV (Conversion - Lincoln)

72. Lincoln's responses to the allegations contained in Paragraphs 1-71 are incorporated herein by reference.

73. Lincoln denies the allegations of Paragraph 73 of the Complaint.

73(a). Lincoln denies the allegations of Paragraph 73(a) of the Complaint.

74. Lincoln denies the allegations of Paragraph 74 of the Complaint.

Lincoln denies the appropriateness and validity of the relief requested in the WHEREFORE clause of Count IV of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim against Lincoln upon which relief can be granted.

Second Affirmative Defense

Plaintiff has failed to join an indispensable party pursuant to Rule 19 and the Complaint should be dismissed pursuant to Rule 12(b)(7).

Third Affirmative Defense

Plaintiff incurred no damages.

Fourth Affirmative Defense

Some or all of the damages sought by Plaintiff are not available under the causes of action he alleges.

Fifth Affirmative Defense

Plaintiff failed to mitigate his damages, if any.

Sixth Affirmative Defense

Lincoln's actions were done in good faith, without malice and without intent such that the relief sought (including but not limited to punitive damages) is not available.

Seventh Affirmative Defense

Plaintiff's claims and causes of action are barred in whole or in part because the alleged injuries and damages were caused by the acts or omissions of third parties over whom Lincoln had not control and with respect to whom it has no legal responsibility or liability.

Eighth Affirmative Defense

The wrongs alleged, if any, were justified and/or excused under the circumstances.

Ninth Affirmative Defense

Plaintiff is not entitled, on the law and/or the facts, to punitive or liquidated damages.

Tenth Affirmative Defense

Plaintiff's claim for punitive damages is barred because it violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and violates Article I, Bill of Rights, sections 9 and 11 of the Constitution of Virginia.

Eleventh Affirmative Defense

Plaintiff's claims and causes of action are barred in whole or in part because none of the alleged acts or omissions of Lincoln were [*sic*] the proximate cause of the injuries and damages allegedly sustained by Plaintiff.

Twelfth Affirmative Defense

The injuries suffered by Plaintiff, if any, were the result of contributory negligence and/or assumption of the risk by Plaintiff.

Thirteenth Affirmative Defense

Plaintiff's conversion claims fails [*sic*] because he consented to the taking and withholding of his personal property and he has abandoned the personal property.

Fourteenth Affirmative Defense

Plaintiff at the time of the alleged injuries was a statutory employee of Lincoln, and as such, is barred from recovery pursuant to the Virginia Worker's Compensation statute.

Fifteenth Affirmative Defense

Lincoln is entitled to equitable credit toward any judgment which might be rendered against it for any Worker's Compensation payment or award which might have been made to Plaintiff with respect to his alleged injuries or other damages.

Sixteenth Affirmative Defense

Lincoln reserves the right to plead such additional affirmative defenses as may be appropriate depending upon facts later revealed during discovery.

WHEREFORE, Defendant Lincoln Property Co. requests that the Court dismiss the claims of Plaintiff with prejudice, award Lincoln its costs and attorneys' fees, and allow Lincoln such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ CONNIE N. BERTRAM
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(202) 962-4800

Counsel for Lincoln Property Co.

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Jan. 6, 2003]

ANSWER OF DEFENDANT SWIB INVESTMENT CO. TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendant SWIB Investment Co. ("SWIB"), by and through undersigned counsel, hereby states as follows for its Answer to Plaintiffs' Second Amended Complaint (hereinafter the "Complaint"):

1. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 1 of the Complaint, and therefore denies the same.

2. SWIB admits the allegations of Paragraph 2 of the Complaint.

3. SWIB admits the allegations of the first sentence of Paragraph 3 of the Complaint. SWIB admits that Lincoln Property Co. ("Lincoln") develops and manages residential communities. SWIB admits that Lincoln manages Westfield Village, which is located in Fairfax County, Virginia. SWIB denies each and every other allegation of Paragraph 3 of the Complaint.

4. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 4 of the Complaint, and therefore denies the same.

5. SWIB admits that, by and through Lincoln's regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia, Lincoln has managed Westfield Village Apartments since 1996. SWIB denies each and every other allegation of Paragraph 5 of the Complaint.

6. SWIB admits the allegations of Paragraph 6 of the Complaint.

7. SWIB admits that Lincoln advertised in newspapers and in realtor brochures that Lincoln was the property manager of Westfield Village Apartments and that Lincoln was the owner and/or property manager of other apartment complexes in the Northern Virginia region. SWIB denies each and every other allegation of Paragraph 7 of the Complaint.

8. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what lessees, including Plaintiffs, knew or whether and the extent to which their dealings were exclusively through the offices and staff of Lincoln, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 8 of the Complaint.

7(b). SWIB admits the allegations of Paragraph 7(b) of the Complaint.

8. [1]SWIB denies the allegations of the second Paragraph 8 of the Complaint.

9. SWIB denies the allegations of Paragraph 9 of the Complaint.

10. SWIB admits that Christophe Roche and Juanita Roche signed a lease as respects to an apartment at 5111 Woodmere Drive, Apartment Unit #104, Centreville, Virginia 20120 (the "Roche Apartment"). SWIB has in-

[1] The Complaint contains two paragraphs designated as "8."

sufficient knowledge or information to form a belief as to the truth or falsity of the allegations concerning what Christophe and Juanita Roche believed, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 10 of the Complaint.

11. SWIB admits the allegations of Paragraph 11 of the Complaint.

12. SWIB admits that Lincoln is engaged in the real estate investment and/or property management business. SWIB denies each and every other allegation of Paragraph 12 of the Complaint.

13. SWIB admits that Lincoln currently, and throughout the Plaintiffs' tenancy, manages Westfield Village Apartments and that SWIB owns Westfield Village Apartments. SWIB admits that Westfield Village Apartments is located in Fairfax County, Virginia. SWIB denies each and every other allegation of Paragraph 13 of the Complaint.

14. SWIB admits that Plaintiffs leased the Roche Apartment and admits that the lease stated that SWIB was the owner of Westfield Village Apartments. SWIB denies each and every remaining allegation of Paragraph 14 of the Complaint.

15. SWIB admits that Plaintiffs were residents/tenants at Westfield Village from August 1998 to May 1999 and from March 2001 to May 2002. SWIB denies each and every other allegation of Paragraph 15 of the Complaint.

16. SWIB denies the allegations of Paragraph 16 of the Complaint and specifically denies that it breached the lease.

17. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 12 [*sic*] of the Complaint, and therefore denies the same.

18. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in

Paragraph 18 of the Complaint, and therefore denies the same.

19. SWIB admits that Lincoln's advertisements for Westfield Village included the statement that Lincoln strives to provide exemplary service in a quality home environment, that it provides 24-hour technical maintenance service to respond to emergencies, and that Lincoln has a "same-day" service request policy. SWIB admits that the apartment brochure included the heading "Your Expectations," and elsewhere stated "You can count on our team of highly trained professionals to provide you with a 24-hour service guarantee. . . ." SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the "primary and material" reason why Roche entered into the Lease, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 19.

20. SWIB denies the allegations of Paragraph 20 of the Complaint.

21. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning injuries allegedly suffered by Plaintiff and/or by his family and the medical treatment received therefor, and therefore denies same. SWIB denies each and every other allegation of Paragraph 21 of the Complaint.

22. SWIB denies the allegations of Paragraph 22 of the Complaint and all subparts thereof.

23. SWIB denies the allegations of Paragraph 23 of the Complaint.

24. SWIB denies the allegations of Paragraph 24 of the Complaint.

25. SWIB denies the allegations of Paragraph 25 of the Complaint.

26. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of alleged injuries suffered by Plaintiff or his wife, and therefore denies the

same. SWIB denies each and every other allegation of Paragraph 26 of the Complaint.

27. SWIB denies the allegations of Paragraph 27 of the Complaint.

28. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of Plaintiff and his family's state of awareness, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 28 of the Complaint.

29. SWIB denies the allegations of Paragraph 29 of the Complaint.

30. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 30, and therefore denies the same.

31. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of alleged health concerns and anxiety suffered by Plaintiff and his family, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 31 of the Complaint.

32. SWIB denies the allegations of Paragraph 32 of the Complaint.

33. SWIB admits that the Roche family moved from the Roche apartment. SWIB admits that Lincoln provided alternative housing, free of charge, to the Roche family during this relocation at the guest suite at the Village at Potomac Falls, another property managed by SWIB. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of confrontations Plaintiff may have had with Vernon Tatem, alleged discoveries made by Plaintiff, or alleged conversations between an unidentified "contractor" and Plaintiff, and therefore denies same. SWIB denies each and every other allegation of Paragraph 33 of the Complaint.

34. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 34 of the Complaint.

35. SWIB denies the allegations of Paragraph 35 of the Complaint.

36. SWIB admits that, in 2001, SWIB managed properties in Northern Virginia, in addition to Westfield Village. SWIB has insufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 36, and therefore denies the same.

37. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning the allegations in Paragraph 37, and therefore denies the same.

38. SWIB denies the allegations of Paragraph 38 of the Complaint.

39. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning Mariba and Tatem's subjective feelings regarding job security, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 39 of the Complaint.

40. SWIB admits that certain employees of a contractor who performed work at Summit Village wore task-specific protective clothing. SWIB denies each and every other allegation of Paragraph 40 of the Complaint.

41. SWIB admits the allegations of Paragraph 41 of the Complaint.

42. The allegations in Paragraph 42 of the Complaint are not directed against this defendant. SWIB denies the allegations of Paragraph 42 of the Complaint.

43. The allegations in Paragraph 43 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 43 and therefore denies same.

44. The allegations in Paragraph 44 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to

form a belief as to the truth or falsity of the allegations in Paragraph 44 and therefore denies same.

45. The allegations in Paragraph 45 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 45 and therefore denies same.

46. The allegations in Paragraph 46 of the Complaint are not directed against this defendant. Further answering, SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 46 and therefore denies same.

46(a). SWIB denies the allegations of Paragraph 46(a) of the Complaint.

47. SWIB denies the allegations of Paragraph 47 of the Complaint.

48. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any past, present or future medical expenses the Roche family has allegedly incurred or will incur, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 48 of the Complaint.

49. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations containing any medical conditions Plaintiff or his family allegedly have suffered or may suffer, including what medications they may have been prescribed, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 49 of the Complaint.

50(a). SWIB's responses to the allegations contained in Paragraphs 1-49 are incorporated herein by reference.

50(b). SWIB states that Paragraph 50(b) contains a conclusion of law, which SWIB need not admit or deny. Answering further, SWIB states that the Virginia Landlord-Tenant Act speaks for itself.

50(c). SWIB states that Paragraph 50(c) contains a conclusion of law, which SWIB need not admit or deny.

Answering further, SWIB states that the Virginia Landlord-Tenant Act and other statutory laws speak for themselves.

50(d). SWIB denies the allegations of Paragraph 50(d) and all subparts thereof.

50(e). SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning any medical conditions Roche or his family allegedly have suffered or may suffer, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 50(e).

50(f). SWIB denies the allegations of Paragraph 50(f).

50(g). SWIB denies the allegations of Paragraph 50(g).

COUNT I (Negligence *Per se* – SWIB [*sic*] and SWIB)

51. SWIB's responses to the allegations contained in Paragraphs 1-50(g) are incorporated herein by reference.

5l(a). SWIB admits that Lincoln held itself out to the public as the property manager of Westfield Village Apartments. SWIB denies each and every other allegation of Paragraph 51(a).

51(b). SWIB admits that Lincoln has a contract to provide management services for Westfield Village Apartments. SWIB denies the allegations of Paragraph 51(b).

51(c). SWIB states that Paragraph 51(c) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 51(c).

52. SWIB states that Paragraph 52 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 52.

53. SWIB denies the allegations of Paragraph 53 of the Complaint and all subparts thereof.

54. SWIB denies the allegations of Paragraph 54 of the Complaint.

55. SWIB states that Paragraph 55 states a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 55.

56. SWIB states that Paragraph 55 states a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 56.

57. SWIB denies the appropriateness and validity of the relief requested in Paragraph 57 of the Complaint. SWIB denies each and every other allegation of Paragraph 57 of the Complaint.

COUNT II (Breach of Lease – SWIB)

58. SWIB's responses to the allegations contained in Paragraphs 1-57 are incorporated herein by reference.

58(a). SWIB admits that it is the owner of Westfield Village. Answering further, SWIB states that Paragraph 58(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 58(a) of the Complaint.

59. SWIB states that Paragraph 59 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 59 of the Complaint.

59(a). SWIB states that the Lease speaks for itself. Answering further, SWIB states that Paragraph 59(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 59(a) of the Complaint.

60. SWIB has insufficient knowledge or information to form a belief as to the truth or falsity of allegations concerning what Plaintiff knew or did not know when he entered into the lease for the Roche Apartment, and therefore denies the same. SWIB denies each and every other allegation of Paragraph 60 of the Complaint and specifically denies that there were latent defects in the apartment.

61. SWIB denies the allegations of Paragraph 61 of the Complaint.

62. SWIB denies the allegations of Paragraph 62 of the Complaint.

63. SWIB denies the allegations of Paragraph 63 of the Complaint.

64. SWIB denies the allegations of Paragraph 64 of the Complaint.

65. SWIB denies the allegations of Paragraph 65 of the Complaint.

COUNT III (Breach of Implied Warranties – SWIB)

66. SWIB's responses to the allegations contained in Paragraphs 1-65 are incorporated herein by reference.

66(a). SWIB states that Paragraph 66(a) contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 66(a) of the Complaint.

[66(b). Not Included in Original]

66(c). SWIB denies the allegations of Paragraph 66(c).

67. SWIB states that Paragraph 67 contains a conclusion of law, which SWIB need not admit or deny. SWIB denies each and every other allegation of Paragraph 67 of the Complaint.

[68. Not Included in Original]

69. SWIB denies the allegations of Paragraph 69 of the Complaint.

70. SWIB denies the allegations of Paragraph 70 of the Complaint.

71. SWIB denies each and every other allegation of Paragraph 71 of the Complaint.

COUNT IV (Conversion – SWIB)

72. SWIB's responses to the allegations contained in Paragraphs 1-71 are incorporated herein by reference.

73. SWIB denies the allegations of Paragraph 73 of the Complaint.

73(a). SWIB denies the allegations of Paragraph 73(a) of the Complaint.

74. SWIB denies the allegations of Paragraph 74 of the Complaint.

Lincoln denies the appropriateness and validity of the relief requested in the WHEREFORE clause of Count IV of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim against SWIB upon which relief can be granted.

Second Affirmative Defense

Plaintiffs incurred no damages.

Third Affirmative Defense

Some or all of the damages sought by Plaintiffs are not available under the causes of action he alleges.

Fourth Affirmative Defense

Plaintiffs failed to mitigate their damages, if any.

Fifth Affirmative Defense

SWIB's actions were done in good faith, without malice and without intent such that the relief sought (including but not limited to punitive damages) is not available.

Sixth Affirmative Defense

The wrongs alleged, if any, were justified and/or excused under the circumstances.

Seventh Affirmative Defense

Plaintiffs are not entitled, on the law and/or the facts, to punitive or liquidated damages.

Eighth Affirmative Defense

Plaintiffs' Complaint as against SWIB fails because it did not cause the harm they suffered, if any.

Ninth Affirmative Defense

The injuries suffered by Plaintiffs, if any, were the result of contributory negligence and/or assumption of the risk by Plaintiffs.

Tenth Affirmative Defense

Plaintiffs' conversion claims fails [*sic*] because they consented to the taking and withholding of their personal property and they have abandoned the personal property.

Eleventh Affirmative Defense

Count III (Breach of Implied Warranties – SWIB) of the Complaint is barred by this Court's order dismissing said claim with prejudice.

Twelfth Affirmative Defense

Punitive damages may not be awarded since they violate the Equal Protection and Due Process Clauses of the United States Constitution

WHEREFORE, Defendant SWIB Investment Co. requests that the Court dismiss the claims of Plaintiffs with prejudice, award SWIB its costs and attorneys' fees, and allow SWIB such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ MICHAEL R. GOODSTEIN
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[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

[filed Feb. 7, 2003]

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND PLEADINGS

I. INTRODUCTION:

The plaintiffs were injured by the landlord's breach of its duties to not injure its tenants. Discovery and depositions have revealed that the negligent acts and the intentional tort alleged were done in a wilful, or wanton, or in a manner evincing a conscious disregard for the rights of plaintiffs and others.

This case was initially filed in September, 2002, in the Fairfax County Circuit Court on a pleading entitled, Motion for Judgment, which had punitive damage claims. The matter was removed to this Court where Motions to Dismiss were argued. An Amended Complaint was filed to which there was no objection, but plaintiffs did not pray for exemplary damages in that Amended Complaint. However, discovery has disclosed the following reasons to permit leave of Court to amend the pleadings to conform to the evidence:

REASONS FOR JUSTIFICATION OF EXEMPLARY/PUNITIVE DAMAGE CLAIMS

1. Numerous complaint [*sic*] were made by the plaintiffs of water leakage and moisture problems in their apartment over a six month period. Service requests were made by the plaintiffs to have the problems relieved, and the defendants were on notice of mold accumulation. Notwithstanding having a very strictly adhered to mold policy, and notwithstanding defendant, Lincoln, claiming that they offered 24-hour immediate response to service calls, the mold hazardous conditions remained over many months. The complaints of the tenant plaintiffs resulted in retaliatory actions against the defendant in his employment and a disregard of the Landlord/Tenant Act applicable to this situation which was done intentionally and with ill-will or spite against the tenants.

2. Even with the knowledge of the hazardous conditions at the apar nent complex, the defendants kept secret from other tenants in the building the hazardous conditions. The defendants knew of the health risks they were exposing their tenants, but went on a course of intentionally withholding this information from the tenants (See attached Exhibit 1).

3. The defendants went on a course of reprisal against the plaintiff, Christophe Roche. They made personal attacks upon his character and took actions to intimidate him from making complaints or finding out about the dangers to which his family was exposed.

4. During the same period of time that these acts described above were occurring at the apartment complex where the plaintiffs lived, within months before and perhaps during the tenancy of the plaintiffs, a similar cover-up of hazardous mold conditions was being conducted at another Lincoln property apartment complex, namely, Summit Village in Arlington, Virginia. (See Exhibit 1) There, tenants were exposed to dangerous levels of toxic mold. This information was given to the plaintiffs by maintenance workers who had worked at that other

location and knew of that occurrence, and eventually told the plaintiffs of this.

5. Lincoln put together a regional maintenance policy that ordered all of its maintenance staff to carefully inspect for and find any water or moisture intrusion in the apartment complexes, specifically trying to locate mold. This policy advised the defendant staff to "protect company assets" rather than be concerned with the risks to which the tenants were exposed. The policy was carried out in order to avoid exposure of the mold to avoid litigation and lawsuits, rather than care about the duty to inform and protect the tenants from hazardous conditions.

6. In violation of the Virginia Landlord/Tenant Act, the tenancy of the plaintiffs was terminated earlier than permitted. This Act requires that under §55-222 120 days should be given to the tenant when the tenant is removed for rehabilitation reasons. Defendant did a remediation and construction with rehabilitation on the apartment of the plaintiffs but did not grant the 120 days, instead making them have only an extension of 45 days.

7. Plaintiff, Christophe Roche, was an employee of defendant, Lincoln, working in the maintenance department. Because of his complaints and eventually finding out about the abuses described above, he was fired from his job under a pretext of him taking documents out of the office. The allegation was that among these documents was the mold policy which the defendant believed would give information to help with a possible claim against the landlord by Mr. Roche, as a tenant. In fact, the documents came into possession by way of a third-party who was employed by Lincoln as well. In effect for "whistle blowing" and filing a complaint, the plaintiff was terminated.

8. The defendant, Lincoln, further retaliated against the plaintiffs by abusing and refusing to grant COBRA and frustrating his efforts to receive health benefits. The defendants knew of the injuries that the plaintiff was suffering because he had notified them of time that he had to

take off to seek treatment for skin lesions, sinus conditions and other problems related to toxic exposure.

9. Discovery had revealed that defendant, Lincoln, punished other maintenance staff, terminating them as well, for making disclosures of information to the plaintiff.

10. Discovery and documentation produced so far has shown that defendant, Lincoln, attempted to cover-up the independent test done by its own tenant in finding toxic mold by conducting a test that didn't even evaluate air samples in the same rooms and areas that the plaintiff had complained; and this information was pointed out to them in plaintiffs' own Environmental Report on where the toxic mold was found, and given to defendants by plaintiffs.

11. Discovery has revealed that other tenants, as well as these plaintiffs, were advised that all of their personal belonging could be remediated and safely returned. Defendant, Lincoln, did such an incompetent and poor job that the plaintiffs learned that clothing that had been returned to another evacuated neighbor living above them still had dangerous levels of spores in all of the porous materials and belonging.

12. The defendants knew or should have known that the Stachybotrys and other toxic molds produced spores that could get into porous materials, and then when exposed to moisture or water, re-generate other spores that once against start the whole process. In essence, all the clothing, upholstery, and wallboard, substrate and other materials in these complexes are subject to the condition reoccurring and having the building and its inhabitant at risk once again.

13. The types of mold found in the plaintiffs' apartment are the same dangerous toxins that are used in chemical weaponry. There is documentation that animals, and particularly a study on horses who have eaten this type of toxic mold, die from this myotoxin. The literature accepted in the scientific community and even in the reports relied upon by defendants' own experts agree that

there are adverse health effects from being exposed to these same toxins. Their own literature and documents provided in discovery show that there is reactive airway disease and sinus and skin irritations, all of which are symptomatic in the plaintiffs. Notwithstanding all of these dangers, and the fact that the dangers probably still exist in the referenced apartment complexes, defendant, Lincoln, continues to deny the existence of the hazard. The method of surreptitiously trying to "bleach out" or do "general maintenance" clean-ups have been and continue to be a complete failure to remedy the situation. Additionally, they have hired what appears to be incompetent remediation crews who have been accused by many of the tenants during the remediation process of stealing jewelry, taking valuables, and destroying the personal belongings of these tenants.

LEGAL ARGUMENT

Rule 15 permits the Court to liberally grant leave to amend pleadings and "shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party maintaining the party's action or defense upon the merits." This Rule even goes so far as to say that even at trial, if there is a variance in the evidence and the issues raised in the pleadings, the Court may grant leave to amend.

Because there was such a lengthy and detailing of these facts in the originally filed Motion for Judgment putting the defendants on notice of all these matters; and because the initial Motion for Judgment filed in the Circuit Court of Fairfax County did in fact request punitive damages, it is respectfully submitted that the defendants cannot claim surprise. Furthermore, prior to filing the lawsuit in an attempt to resolve the claim of Mr. and Mrs. Roche, a copy of the pleading and a full description of why exemplary damages could be awarded was presented to counsel for Lincoln.

Plaintiffs request that they be permitted to amend the pleading to allege that the actions of the defendants, as set forth in the Amended Complaint, "were done with a conscious disregard for the rights of the plaintiffs." In Virginia, punitive damages are awarded when malice, which is defined as "ill-will, malevolence, grudge, spite, wicked intention, or conscious disregard for the rights of another" are shown. *Lee v. Southland Corp.*, 219 Va. 23, 244 S.E.2d 756, 759 (1978). Here, there is plenty of evidence of ill-will, grudge, spite, and with all due respect, even wicked intention leveled against these plaintiffs. The proof elicited even to this point would justify the standard of "a conscious disregard for the rights of another."

> "Punitive damages, the purpose of which is not so much to compensate the plaintiff but to punish the wrongdoer and to warn others, may be recovered 'only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.'" *Hamilton Development Company v. Broadrock Club, Inc.*, 245 Va. 40, 45, 445 S.E.2d 140 (1994) (quoting *Giant of Virginia, Inc. v. Bigg*, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967), in referencing as authority *Pueant v. Dickens*, 245 Va. 217, 219, 427 S.E.2d 340, 342 (1993)).

The plaintiffs request that the Amended Complaint be amended so it alleges that the defendants acted with "ill-will, malevolence, grudge, spite, wicked intention, or a conscious disregard of the rights of another."

Respectfully submitted,

CHRISTOPHER ROCHE
JUANITA ROCHE
By Counsel

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar Number: 9211

[certificate of service omitted]

Summit Village Apartments

From: "Melvin Bryan" <MBryan@lpsi.com>

To: "Lincoln at Fairoaks MID-ATL APTS" <lincolnatfairoaks@erols.com>; <mtlaurelcrossing@erols.com>; <mty1@erols.com>; <NJsouth@erols.com>; <applebriar@lincolnapts.com>; <ashfordmeadows@lincolnapts.com>; <harbourgates@lincolnapts.com>; <LibertyPark@lincolnapts.com>; <liberty Park@lincolnapts.com>; <lincolnatfairoaks@lincolnapts.com>; <lincolnwoods@lincolnapts.com>; <mayfaire@lincolnapts.com>; <mgrfairfaxcorner@lincolnapts.com>; <mgrgatesofmclean@lincolnapts.com>; <mgrhermitage@lincolnapts.com>; <mgr potomacfalls@lincolnapts.com>;<mgrpotomacplace @lincolnapts.com>; <mgrpotomacyard@lincolnapts.com>; <mgrsenecaclub@lincolnapts.com>; <njnorth @lincolnapts.com>; <opmanager@lincolnapts.com>; <riverpointe@lincolnapts.com>; <senecaclub@lincolnapts.com>; <summitvillage@lincolnapts.com>; <Treetops@lincolnapts.com>; <Villageat foxpoint@lincolnapts.com>; <westfieldvillage@ lincolnapts.com>; <windsoratfairlakes@lincolnapts.com>

Cc: "Diana Penn" <dianapenn@erols.com>; <summit villagemaint@hotmail.com>; <opmaintenance@lincolnapts.com>;"Glenn O'Brien" <GOBRIEN@lpsi.com>; "Rick Leith" <LEITH@lpsi.com>; "Lana Zylka" <lzylka@lpsi.com>; "Peggy Reynolds" Preynolds@lpsi.com>

Sent: Wednesday, July 11, 2001 10:52 AM

Attach: Mold PM walk sheets.xls

Subject: Important Policy Change

Business Managers – Please print for the Lead Technicians

In response to the mold situation that is sweeping the nation, it has become necessary for LPC to become even more pro-active in protecting the assets, investors, asset management groups and our own interest from exposure to this type of liability. Right or wrong, the way we used to handle leaks and mold problems in property management is gone forever. Mold can develop from various sources such as roofs, plumbing, appliances, etc. In the case of Stachybotrys, when the mold reproduces it develops toxic spores and an unhealthy environment.

Therefore, it is extremely important that each community conduct a unit by unit inspection for mold and sources of leaks. If you have not yet conducted your 3rd quarter filter changes, now would be the ideal time to do it. It is advisable to notify the residents that we will be checking every sink, toilet, hot water heater, patio/balcony storage rooms, HVAC closets. The notice should not mention mold but rather that we are conducting leak checks.

I know this is a busy time of the year but this needs to get started as expeditiously as possible. Communities close together can combine staffs to make the process go much quicker. I have attached a PM form that is the only form to be utilized during these inspections.

I will need a report from each property as to when this process will start and I will need copies of all documentation throughout the process. I might also make you aware that the Quarterly On-Site Inspection form has been revised for check off for this inspection and other mold related issues totaling 75 points.

Thanking you in advance for your support and cooperation.

Melvin Bryan
Regional Maintenance Director
703 834-1900
MBryan@LPSI.com

Summit Village

Memo

To: Service Technicians
From: Manager
cc: Melvin Bryan and Andi Rothestein
Date: 02/14/02
Re: HVAC closet check

Per the owners request there will now be a new policy. Please check the HVAC closets for any signs of moisture when you conduct a service ticket only if the resident is NOT home. If moisture is detected please report it to Jo Gavigan immediately.

LHC employees to wear Safety Eqmt
- We are to remove valuables for them:
  to include money
  jewerly
  guns
  documents
- we are to get all clothing + linens dry cleaned and/ or laundered
- Resident can bring 3-days of clothes @ $500 each (per person)
- we are to do itemized list of all belongings (video tape), have resident sign off on
- change locks for residents protection
- Belongings to be cleaned + stored here on property. Access through office.
- ≈ 6 wks
- Okay to terminate lease
- Document all conversations
- Melven
  bullet form March 8 to just facts today

Dianna McGaughey

From: "Melvin Bryan" <MBryan@lpsi.com>
To: <westfieldvillage@lincolnapts.com>
Sent: Friday, January 18, 2002 1:13 PM
Subject: Letter

Diana,

Pursuant to the items noted in the letter, I recommend that you incure [*sic*] the expense to: l) that we get contractor bids to inspect the window for a siding/molding/caulking problem 2) Have the tub enclosure professionally regrouted – I do not want any water to penetrate and come into contact with the affected drywall/wood again 3) Have the tubs professionally glazed (refinished) 4) replace baseboard and quarter round in blue BR 5) Insure that Sam of S&S Carpet uses an enzyme on the carpet after all repairs, the live organism will kill any mold spores in the carpet 6) With exception of the items indicated above plus the carpet tack and drywall repairs, all other functions should be repaired in-house. Advise Brima that I will check status around Tuesday.

With regards to him meeting the RPM, there should be no need once all issues are resolved.

Melvin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,
v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

February 13, 2003

DEPOSITION OF:
FRED E. CHANEY

was called for examination by Counsel for the Plaintiff, pursuant to Notice, taken at the law offices of Jerry M. Phillips, Esquire, Phillips, Beckwith, Hall & Chase, 10513 Judicial Drive, Suite 100, Fairfax, Virginia 22030, commencing at 1:10 p.m., on the 13th day of February, 2003, before Mary Silverthorne, a Notary Public in and for the State of Virginia, at Large, when were present on behalf of the respective parties:

* * * * *

[4] PROCEEDINGS

Thereupon,

FRED E. CHANEY

the witness, called for examination by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PHILLIPS:

Q Would you please state your name and address?

A Fred Chaney, 4028 Centenary – that's C-e-n-t-e-n-a-r-y – Dallas, Texas.

Q And would you please tell us what your occupation is and your position?

A I am property manager for Lincoln Property Company and Senior Vice President.

Q And do you sit on the board of Lincoln Property?

A We're a partnership. I am a partner in new deals. We don't have a board.

Q And this is a limited liability corporation or company?

A We have multiple structures that we [5] operate under.

Q And where is the corporate headquarters?

A Dallas, Texas.

* * * * *

[18]

* * * * *

Q Now, Lincoln, as you say, is a partnership?

A Yes.

Q And with its headquarters in Dallas, how many employees work for Lincoln Properties Partnership?

A Can you dissect the difference between commercial and residential? If you can, I can answer that. If you can't, I can't, because I don't know.

Q What is your knowledge – what would your knowledge be in, residential?

A Purely residential.

Q What would that be?

A And I am –

MS. BERTRAM: Objection, vague. Go ahead.

THE WITNESS: Approximately 2000 employees.

* * * * *

[21]

* * * * *

Q Now, this is not traded – is it – on any stock exchange?

A No.

Q And it is not a publicly offered entity since it is a partnership. Am I correct?

A Correct.

* * * * *

[28]

* * * * *

Q Besides managing some of these properties, do you also own some of them – complexes?

A We're in partnerships. Various Lincoln partnerships are in ownership – various Lincoln partners are partners in partnerships that own assets.

Q Okay. What percentage of the apartments that Lincoln Properties manages are also subject to partnership ownership?

A Approximately 25%.

Q Westfield Village is one of the Virginia properties?

A Yes.

Q Is that – and you know that is owned by SWIB?

A That is correct.

Q Is there any partnership arrangement with that?

A No.

* * * * *

[66]

* * * * *

MR. PHILLIPS: Okay. And I am going to show you what I will be asking to be marked as Number Nine.

(Thereupon, Exhibit Number Nine was marked for identification.)

BY MR. PHILLIPS:

Q It is entitled Company Mission Statement. Would you look at that? Does that appear to be accurate?

A Uh-huh. (affirmative) That is correct.

Q Was that in effect – it has been in effect for how long?

A I think this mission statement has been in effect for a couple years.

MR. PHILLIPS: Okay. I show you one other. Off the record.

(Thereupon, Exhibit Number Ten was marked for identification.)

MR. PHILLIPS: I will represent that I took these off of the website also today.

(Thereupon, remarks were made off the record.)

[67] BY MR. PHILLIPS:

Q Number Ten has a list of clients in alphabetical order. Even though – I'm telling you that I – or I represent to you that I took this off today, February 13th. But this is not a complete list – is it – of all the clients?

A I can't tell you. I don't know. I mean it, in general, lists most of our clients.

Q Would Invesco be one of them that should have been listed here?

A I don't know why not. Invesco is.

Q It is?

A Uh-huh. (affirmative)

Q Which one is? Oh, yeah Invesco, Realty. It is listed. I apologize. And do you know how many more should be listed that aren't on here?

A Again, generally, that is a representation of the bulk of our clients. 70% or 75% of the buildings that we manage are owned by third parties, some of which are individual owners.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Feb. 14, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S SUPPLEMENTAL ANSWERS TO PLAINTIFF CHRISTOPHE ROCHE'S FIRST SET OF INTERROGATORIES

* * * * *

In addition to its General Objections, Defendant objects to this Interrogatory on the grounds that it purports to impose requirements different from or in addition to the Federal Rules of Civil Procedure and the Rules of the United States District Court for the Eastern District of Virginia. Subject to and without waiving its General and Specific Objections, Defendant will produce the expert disclosures required by the Federal Rules and the Local Rules pursuant to and within the time frames established by those rules.

SUPPLEMENTAL ANSWER TO INTERROGATORY No. 15

Subject to and without waiving its General and Specific Objections, see Defendants' expert disclosures pursuant to Rule 26(a)(2).

AFFIRMATION

I, Jeff B. Franzen, hereby certify and affirm, under the pains and penalties of perjury, that I am the Senior Vice President/Partner for Defendant Lincoln Property Co. ("Lincoln"), that I am authorized to act for Lincoln, that the facts set forth in these Supplemental Answers to Plaintiff Christophe Roche's First Set of Interrogatories have been assembled at my direction, with the assistance of authorized employees and counsel for Lincoln, and that the assertions therein are true and correct to the best of my knowledge, information and belief. Lincoln reserves the right to supplement its responses to the extent that subsequent discovery should reveal any additional facts not currently known to Lincoln. Executed this 14th day of February 2003.

/s/ JEFF B. FRANZEN
Jeff B. Franzen
Senior Vice President/Partner

[signature block and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Feb. 14, 2003]

DEFENDANT LINCOLN PROPERTY CO.'S SUPPLEMENTATION OF INITIAL DISCLOSURES PURSUANT TO RULE 26(a)(1)

* * * * *

Lincoln expressly reserves all objections to the use and admissibility of any of the categories of documents identified in these Initial Disclosures. Moreover, Lincoln reserves any objections it may have to the production of these categories of documents under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or any privileges or protections that may be available under federal or state statutory or common law.

I. 26(a)(1)(A):

In compliance with Rule 26(a)(1)(A), Lincoln lists below the names, addresses, and telephone numbers of individuals who are likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings:

Name	Address	Topics
John LeBeau Vice President Lincoln Property Co.	Contact through counsel for Lincoln only.	Leases between the Roches and SWIB Roches' service requests Lincoln's response to service requests Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment Handling and storage of the Roches' personal property
Jeff B. Franzen Senior Vice President/Partner Lincoln Property Co.	Contact through counsel for Lincoln only.	Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment Handling and storage of the Roches' personal property
Lana Zylka (Former) Regional Manager Lincoln Property Co.	Contact through counsel for Lincoln only.	Lease between the Roches and SWIB Roches' service requests Lincoln's response to service requests Alleged mold in the Roches' apartment Lincoln's mold policies for Westfield Village Remediation of the Roches' apartment

* * * * *

[signature block and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

ORDER

THIS MATTER is before the Court on Plaintiffs', Christophe Roche, et al., motion to voluntary [*sic*] dismiss Count II pursuant to Federal Rule of Civil Procedure 41(a)(2). For the reasons stated in open court on February 21, 2003, it is hereby

ORDERED that Plaintiffs' Motion to Voluntary [*sic*] Dismiss Count II Pursuant to Federal Rule of Civil Procedure 41(a)(2) is GRANTED. It is further

ORDERED that, should Plaintiffs re-file a claim similar to Count II, they shall bear attorneys' fees for all parties in this litigation as to that count.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 10th day of March, 2003.

/s/ GERALD BRUCE LEE
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/10/03

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[filed Mar. 13, 2003]

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO BAR TESTIMONY BY RICHARD BERNSTEIN, M.D. AND FOR SUMMARY JUDGMENT ON ALL CLAIMS FOR PERSONAL INJURY

[text, signature block, and certificate of service omitted]

* * * * *

4.0 RESULTS

4.1 Visual inspections

A visual inspection of the interior of unit 104 was conducted which revealed evidence of significant repairs to the walls of the HVAC closet and the front bathroom (near main entrance). These repairs had been conducted to repair damage from a major water leak which resulted from the deterioration of the water piping within the walls. During the time of the inspection the water leak near the HVAC closet had been repaired and there was no indication of wetness on the drywall. The walls of the front bathroom were also dry. Visible mold growth was observed on the ceiling of the HVAC closet, the interior of the HVAC unit duct work and inside the walls of the front bathroom. In addition mold growth was observed on the inside surface of drywall installed around the baseboard of the linen closet, and the north wall of the bedroom behind the HVAC closet. Mold growth was also observed around the edges of all the bedroom windows which was the result of water entering the living space of the unit from outside.

4.2 Bulk Sampling

A total of two bulk samples were collected from areas of visible mold growth which included the HVAC closet ceiling, the fiberglass insulation inside the HVAC ductwork. The results of analysis for these samples can be seen in the table below.

Table 4.2
Bulk Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results (cfu/g)*
CR0224BLK01	HVAC closet ceiling	Stachybotrys Chartarum (atra)	98%	4.0×10^6 cfu/g
		Cladosporium species	1%	
		Penicillium species	1%	
CR022402BLK02	HVAC unit inside duct	Penicillium	79%	1.3×10^6 cfu/g
		Cladosporium	12%	
		Ulocladium	7%	

* cfu/g – colony forming units per gram

4.3 Air Sampling

A total of four air samples were collected at the subject site. These included 2 air samples collected via the Anderson sampler onto 10 cm malt extrose agar (MEA) plates and 2 samples collected on glass microscope slides with a Burkard sampler. The results of analysis for these samples including the sampling time and volume can be seen in the table below.

Table 4.3
Burkard Air Sampling Results

Sample ID	Location	Fungal Species Identified	Number of spores per cubic meter (spores/m³)	Total spores per cubic meter (spores/m³)
CR0224BKD0C	Living Room	Cladosporium	308 spores/m³	1672 spores/m³
		Ascospores	44 spores/m³	
		Smuts, Periconia, Myxometes	44 spores/m³	
		Stachybotrys	1056 spores/m³	
		Hyphal elements	176 spores/m³	
		Ep[illegible]cum	44 spores/m³	

CR0224BKD09	Outdoor patio	Cladosporium	22 spores/m³	352 spores/m³
		Basidiospores	22 spores/m³	
		Colorless	22 spores/m³	
		Unknown	242 spores/m³	
		Hyphal elements	22 spores/m³	
		Torula herbarum	22 spores/m³	
All sample results are based on a sampling volume of 90 litres				

Table 4.3a
Anderson Air Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results colony forming units per cubic meter (cfu/m³)
CR0224BIO07	Living Room	Stachybotrys Chartarum (atra)	98%	640 cfu/m³
		Aspergillus sp. (multiple types)	28%	
		Cladosporium	22%	
		Aspergillus versicolor	11%	
CR022402BIO08	Outdoor patio	Cladosporium species	88%	270 cfu/m³
		Sterilia mycelia	12%	
All sample results are based on a sampling volume of 28.3 litres				

4.4 Wipe Sampling

A total of three wipe samples were collected from the interior of Unit 104. These included samples from the HVAC unit drain pan, the inside of the linen closet baseboard drywall, and the inside of the bathroom baseboard drywall. The results of analysis for these samples including the surface area wiped can be seen in the table below.

Table 4.4
Wipe Sampling Results

Sample ID	Location	Fungal Species Identified	Percentage of sample	Results colony forming units per square inch (cfu/in²)
CR022402WPE03	HVAC closet drain pan	Penicillium	77%	13,000 cfu/in²
		Ulociadium	15%	
		Yeast	8%	
CR022402WPE04	Linen Closet (inside of baseboard drywall)	Penicillium species	72%	130,000 cfu/in²
		Aspergillus sp. (mixed to include A. niger)	24%	
		Trichoderma	4%	
CR022402WPE05	Front bathroom near entrance	Aspergillus	52%	23,000 cfu/in²
		Stachybotrys Chartarum (atra)	17%	
		Chaetomium	13%	
		A. versicolor	9%	
All sample results are based on an area sampled of 1 square inch (in²)				

5.0 CONCLUSIONS

Based on a review of the analytical data, visual observations, and interviews with the occupants of Unit 104 it is concluded that a significant amount of past water leakage was the most likely cause of toxigenic mold growth and contamination that has occurred within unit 104 and that the level of this contamination may be extensive, or covering an area greater than 32 ft². Exact measurements of the total amount of surface area with visible mold growth could not be obtained during the investigation because it occurred within enclosed wall spaces which could not be accessed.

In addition it is also apparent that the occupants of Unit 104 have been continuously and repeatedly exposed to toxigenic fungal spores during their most recent period of occupancy. The types of fungal spores identified within

the sampled air of the space include known toxigenic species that are well documented such as *Stachybotrys chartarum (atra)* which also appear in wipe, and bulk samples collected from other surfaces within the unit. The presence of airborne fungal spores is also an indication that they are distributed widely throughout unit 104 and that the carpeting, and other fabric surfaces within the unit have also been contaminated by the settling of airborne fungal spores via natural processes out of contaminated air. These spores then become a source of chronic potential dermal contact through normal use of the unit and a potential source of chronic inhalation exposure from re-entrainment of the spores into the breathing zones of the occupants depending on the amount of foot traffic or other activity in the area. The exposure scenario is further complicated by the HVAC system of the unit which recirculates the air within the space on a regular basis. This creates turbulent air which provides the energy necessary for a larger amount of disturbed fungal spores to remain airborne longer than they normally would under quiescent conditions with little or no air disturbance.

While the severity of exposure is difficult to estimate, and no direct link between the occupants' health complaints and their exposure can be shown through the methods of this investigation, consideration should be given to the fact that the occupants' health complaints which included, headaches, sore throats, hair loss, irritation of the respiratory tract, fatigue, and dermatitis are all consistent with well defined case studies of chronic trichothecene intoxication. This is a powerful mycotoxin specifically produced by *Stachybotrys Chartarum (atra)*, a species of toxigenic fungi, in addition to others, proven to be present within unit 104.

6.0 RECOMMENDATIONS

Based on the conclusions reached above the following recommendations are made:

- Submit blood serum and urine samples for detection of mycotoxin, endotoxins, or any other mold toxin that may be present or their metabolic by-products.
- Evacuate the unit to prevent further exposure to airborne toxigenic fungal spores.
- Collect additional archival bulk samples of carpeting and fabrics within unit 104 for possible later use in isolating mycotxins [*sic*], endotoxins, or other toxic fungal metabolic byproducts.
- Collect additional archival vacuum samples of carpeting and fabrics within unit 104 for possible later use in isolating mycotxins [*sic*], endotoxins, or other toxic fungal metabolic byproducts.
- Perform additional carpet and fabric sampling to further define and document exposure conditions and levels of potential exposure within unit 104.
- Inform the property management firm responsible for maintenance of the property that toxigenic fungal growth has occurred with unit 104 in order for them to take appropriate measures at preventing other individuals or families resident within the complex from being exposed in a similar manner. These measures include but are not limited to:
  - Performing a review of established procedures for preventing and eliminating mold growth within living units.
  - Performing a survey of the occupied units within the property to identify any units potentially impacted in a similar manner.
  - Developing an appropriate remediation plan for affected areas of Unit 104 to eliminate the sources of toxigenic fungal spores which include the walls, carpeting and HVAC system, or any other affected surface.
  - Restricting employee access to unit 104 to only those authorized persons wearing appropriate

personal protective equipment (PPE) consisting of HEPA filtered negative pressure air-purifying respirators and tyvek suits.

* * * * *

Mold Investigation Report 5111 Woodmere Dr., Unit 104
3/17/02 2:59 PM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Mar. 24, 2003]

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[text, signature block, and certificate of service omitted]

* * * * *

Transcription of taped meeting on 03-26-2002 with Representatives of Lincoln, SWIB, and Invesco

Transcription of meeting taped on 03-26-2002 between Mr. Roche and representatives for Invesco, Lincoln, and SWIB.

Persons heard on tape are:

1. Mr. Christophe Roche – Resident of 5111 Woodmere Dr. #104 Centreville Va. 20120

2. Mr. John Lebeau – Regional Vice President for Lincoln properties in metro D.C. area

3. Mr. Glen O'Brien – Regional property manager in northern VA.

4. Mr. Fred Chaney – Senior Vise [*sic*] President of Lincoln property Company (from Dallas Texas)

5. Mr. Ken Kaminski – Executive with Invesco Real estate advisors and representing SWIB (also from Texas).

The parties on this transcript will be identified by there [*sic*] first names for the rest of this document.

Begin transcription:

Chris: Hey!

Glen: You Chris?

Chris: yea.

Glen: Hey, Glen O' Brien.

Chris: Good to meet you, Glen.

Ken: Chris, Ken Kamenski with Invesco , how ya doin'?

Chris: Good to meet you, Ken.

John: John Lebeau, Chris.

Chris: Hi, John.

Fred: Hey, you got everybody here, Fred Chaney.

Chris: Hi Fred.

Fred: How are you?

(Laughter)

Fred: Name (unclear) is on his way.

Ken: Sorry we're late but this shouldn't take a whole lot of time I wouldn't think (Numerous persons talking, unclear . . . gathering to table)

Ken: Chris, I don't know, do you know much about Invesco?

Chris: ah I know very little about ah, the entire Lincoln company, I've only been with them for a little over ninety days

Ken: Let me just give you a brief. Invesco is the adviser for the owner of the apartment where you reside and umm I've come in here for property inspections and I'll be here until tomorrow. I've received, I guess, the most resent [*sic*] letter that you and your wife

Chris: Uh huh

Ken: . . . that uh you handed into the office and consequently that went up to our office, and went to various people and I guess I'm just gonna umm sort of peruse it with you but uh basically the collective word was we can agree to about most of it. There's two points that we can't.

Chris: O.K.

Ken: In order for us to begin the remediation to get your stuff back we need you to sign off on that

Chris: Uh huh

Ken: 1 thru 5 we can, we can say o.k. to, doable but 6 and 7 are the two items we can not

Chris: 0.k. and uh you provide a guarantee

Ken: No

Chris: That our stuff will be microbe free

Ken: and the reason behind that is (muffling) you're always gonna have microbes

Chris: Uh huh

Ken: No matter where and Invesco, the owners, I don't think you'll ever get a guarantee or warrantee [*sic*] on the microbial

Chris: Well I think, I think we need to be a bit more specific obviously we're talking about the three toxic microbes that are in there um obviously there is pollen in the air there's other molds out there in the environment. What we're concerned with is the, is the uh the bad stuff. So, we can certainly refine that to indicate that if that's what we need to do.

Ken: Let me give you a (unclear) recommendation on that and again I'm leaving to go home so discuss with your wife where you want to go with this. Let me recommend that on items six and seven, if you have any doubt in you're [*sic*] mind and your [*sic*] not willing to say you know delete it –

Chris: uh huh

Ken: Let me recommend that you give it to your attorney and we give it to our attorney and let them work out the details

Chris: ok.

Ken: Ok ? We are not going to be able to work with in your apartment until you ease of [*sic*] that.

Chris: Ok.

Ken: ok?

Chris: Ok that's agreeable.

Ken: ok good.

Fred to Ken: Does he have your attorneys info?

Chris: ah yes?

Ken: Let me give it to you, you got a pencil? His names [*sic*] Ken lapintene

Chris: Could you spell the last name for me?

Ken: L-A-P-A-T-I-N-E

Chris: ok.

Ken: At Greenburg and Trarig, Greenburg G-R-E-E-N-B-U-R-G and traurig T-R-A-U-R-I-G and you need his number its [*sic*] 212-801-3189.

Fred to Ken: Do you have his attorneys name?

Ken: ummmm.

Chris: And that's for Invesco right?

Ken: yes.

Chris: ok.

Ken: I didn't think we have verification of your attorney, do you have one or?

Chris: yes. Yea hold on one second and I'll give you that.

Ken: let me tell you is it Phillips, Beckwith, hall, and Chase?

Chris: Yes, Jerry Phillips.

Ken: Ok and there [*sic*] in Fairfax Va (703)-691-4100.

Chris: uh huh That's it.

Ken: Judicial Drive suite 100, got ya.

(call over radio)

Ken: I think it's better than for me to negotiate more on 6 and 7 all I can tell you is were [*sic*] we are at and while I respect your reason for writing that I am no attorney in terms of coming up with any kind of acceptable language that would make me feel comfortable

Chris: Right, neither am I so,

Ken: So on those two items, definitely one the one for sure ah were [*sic*] you want to be able to go in there and suit up

Chris: Right when I, when I meet with ah um with Melvin and uh I guess it was Barco and Core that was one of the things they suggested we could do to ah to get a couple of the sentimental items and have them hermetically sealed so but I guess that's, That's changed now so.

Ken: no we've (not understandable) the locks and nobody really can get in there so we can resolve

Chris: Right.

Ken: our issues so.

Fred: You know on a on a bigger picture issue here I don't think we can make that guarantee on any issue

Chris: um hm

Fred: you know because as ken talked about aaa umm this problem if you wana [*sic*] call it one's been around for thousands a [*sic*] years

Chris: un huh

Fred: and tell you or any body else that its [*sic*] gonna be completely microbe leer [*sic*] free and I don't know what words you used an [*sic*] you know we cant [*sic*] do that

Chris: um hum

Fred: aahhhh cant [*sic*] do it on that unit and probably cant [*sic*] do it on any unit so um

Ken: same thing with your (not understandable) that comes by I mean you can you can infect them with that it being on your clothes right now going to the hotel and you could be infecting it with the (not understandable).

Chris: un huh. Yea I think I think like you suggested umm turning it over to the attorneys probably for them to come up with ah ah an appropriate and agreeable situation is probably best.

Ken: Ok.

Fred: well since an attorney is involved ah have you you you remembered you signed a arbitration agreement when you went to work for the company you

Chris: na I don't recall anything like that.

Fred: ya probably aught [*sic*] to you aught [*sic*] to give him a copy of what he signed so he makes his attorney aware of it. You know from my stand point I am curious to know if your [*sic*] willing to talk about it you know I mean. This surfaced you know ten days ago and it's a it's a serious matter or we all wouldn't be here and you know we've

been diligent in our process I am curious to know why an attorney is involved

Chris: um hum

Fred: you know if we weren't willing to do anything then I would understand somebody like you going to get attorney, but uh just for future reference we insure that we have policies and programs that protect people like you I'm I'm curious to know why why if your [*sic*] willing to talk about it why an attorneys [*sic*] involved.

Chris: I would be, I am sure once I talk to him um if he ok's it um I would be willing to talk, but he say's no at this point you know he's advised me that any communication as far as this situation questions you just asked and so on and so forth needs to be addressed with with him present so.

Ken: Ok then I recommend give that to him but I want to ask if you would do me a favor, I still need a copy of the report from Potomac that says that there is (not understandable) issues

Chris: um hum

Ken: um is there any way that I can get a copy from you.

Chis: yea, let me give him a call and see if he's got he's got all the copies of that so let me give him a call.

Speaker unidentified: marry your s [*sic*] up with his attorney.

Chris: That's what I'll do.

Fred: you know ah if ah you [*sic*] motives are to get problems fixed is one thing. If your motives are caution for lawsuit that's something else and if were [*sic*] working in concert to get the problems solved we aught [*sic*] to be able to have a copy of whatever somebody's told you is the problems that exist

Chris: un huh

Fred: ummm (not understandable) when you went to wok [*sic*] for us you signed a [*sic*] arbitration agreement (not

understandable) so you need to make your attorney aware of that.

Chris: yes, well I uh, we've already discussed all of that and I think the stance on that is this has nothing to do with my employment with Lincoln, um you know we were residents there long before I ever agreed to go to work for Melvin.

Fred: (not understandable) again that's a, they will let the attorneys –

Chris: Right. Right.

Ken: (not understandable) if we were to remove all the guns.

Chris: umhm

Ken: Can you tell me what is it you want?

Chris: Right.

Ken: And that's where everybody's scratching their heads saying "ok where are we going with this" and I cant [*sic*] explain that, all I can do is say I am making a [*sic*] effort to remedeate [*sic*] it.

Chris: umhm

Ken: got em out and in hotels and abating the rent, doing everything (not understandable) do. But still got cog's [*sic*] in the wheels here. So I am left with the representatives saying why what does he want? Cause if he wants something come get it. (Not understandable) it all out, get to the bottom of it, or am I just spinning my wheels trying to fix something that

Fred: cant [*sic*] be fixed.

Ken: cant [*sic*] be fixed! Can you answer that?

Chris: At this point I cant [*sic*] answer anything,

Ken: All right.

Chris: I will communicate with him (pointing to jerry's information) I am sure that he will be more than willing to effectively communicate to ken exactly where we are, exactly everything that's going on. I, like you, am on the other side of the fence as you guys,

Ken: I know that, I understand.

Chris: And um you know.

Ken: Can you tell me what, I understand, can you tell me what possessed you to hire Potomac, do you know Potomac?

Chris: um from my dealings with them in this situation is how I know them. But I cant [*sic*] I cant [*sic*] um,

Ken: And health issues (not understandable)?

Chris: I cant um go any further into it than that at this point.

Fred: Any reason why you didn't tell us that uh of what you suspected you were exposed to.

Chris: You were notified, you guys were notified, as a matter of fact you were notified via letter in January so uh

Fred: Do we have a copy of that letter?

Chris: yea, you should, you should.

Ken: Can I ask you who –

Chris: as a matter of fact the letter went to Dianna and a copy of the letter went to Melvin so, and Melvin was involved in the situation back then so I don't know what kind of information that you guys have got from you [*sic*] side of things but um

Ken: Ok all right thanks uh,

Chris: Well it goes back actually a lot further than that so my suggestion with out really being able to say much is you guys should have a a complete file on our history from the time we moved in there um and you should have those letters as well as the service request, and everything else in that file on our apartment. I would um I would say look thru that, you will get a clear picture if you guys haven't already got the chance to look thru it.

Ken: I very much appreciate it, may I rely on you if in the event, and keep in mind uh where we don't want to go adversarial with you. I like you on the other side of the fence. I know this is your current employer and I employ

Lincoln on the property and then the owners you know the owner –

Chris: Right

Ken: uh kind of so called somewhat neutral and this is all new to the whole real estate, I mean we've heard about it but, can I rely on you if in the event the paper work that you should of went in is not around, can I get a copy?

Chris: Um I don't think that he would have a problem giving you guys a copy of that. I don't.

Ken: Can I ask for it now?

Chris: I don't have it.

Ken: No, I mean ask for it and assume that its [*sic*] not around.

Fred: (Not understandable)

Ken: I would love to have it.

Chris: I will I will speak with him, and and um see what he has to say, but I don't, once again I am not a lawyer so I don't know, but I don't think he would have a problem providing something that you guys have already been given. As a matter of fact um I cant [*sic*] imagine that that document is missing because there was a response document um or several response documents to it so.

Ken: I am just asking ya I am going to go back (not understandable) you know what we don't have it or it went in to a black hole so maybe that happened, maybe, maybe not and it may be there I am just since we are face to face you know you can produce it it sure would be great. More importantly produce the report from Potomac, that one there has got everyone looking for it and since they've gone above and beyond now with barco and core and also hired the attorneys.

Chris: Now you seen [*sic*] obviously the um analytical data from Potomac right?

Ken: I have seen nothing.

Chris: You don't have a copy of the analytical data that was sent over from them, that's already been provided to Melvin as well.

Ken: I am going to I am going to reserve,

Fred: can you make a list of to the best of your recollection of everything that you think that you have given us?

Chris: Sure.

Fred: Because again clearly were were, this is, the only thing we have from you that we know of from our level is your is your letter the seven point letter we got here.

Chris: Well I would assume,

Ken: I got a letter from you and your wife a copy of the letter that says hey we want to approve barco nobody else in there that was written I think,

Chris: did you get the letter before that?

Ken: which was?

Chris: Which was when we were called in and we met with Melvin and I am sorry Lana, lona, about um I guess it was Tuesday of last, Thursday of last week, about them coming in and cleaning the apartment and sending our clothes off to the drycleaner?

Ken: And that was the letter where you said hey I don't want you guys doing that,

Chris: Right.

Ken: we did get that (not understandable)

Chris: you did get that?

Ken: That's the other letter I received from you then the next letter was,

Chris: Now before that is what I am talking about which is the analytical data and Melvin had that with him at that, at this particular meeting, and that's the site map of the unit.

Ken: Was the analytical data this?

Chris: That's it!!!

Ken: This right here, yea. I, I cant [*sic*] read it this one sheet of paper.

Chris: ok.

Fred: (ask a question not understandable)

Chris: Yea, I will give him a call he's got all of that.

Ken: Yea I got it but I don't know what it says (not understandable) environmental testing um just a diagram I guess I am looking for results and maybe that's what it says with in this.

Chris: yes with in all of those blocks there are the specific analytical data of the molds, of the counts, so on and so forth.

Ken: Ok ok.

Chris: which is I am assuming what you guys are looking for,

Ken: I guess just a legible one, that's a fax of a copy, what have you that's not going to show thru.

Chris: sure, sure.

Ken: now you haven't sent anything else other than you've given that, and you say prior to that in January and maybe going back whenever during your occupancy which I'll assume is coming up on year?

Chris: past a year yea, this month.

Ken: um that you have given it in to the office, correspondence.

Chris: Yes, numerous.

Ken: ok. I am not an attorney, numerous meaning one, two, three, more?

Chris: um, you know off the top of my head I would say that there should be probably eight or nine umm different service request in the file as well as the letters.

Ken: (not understandable) should be?

Chris: yes, as a matter of fact I got the copies umm from the file from the office,

Ken: You do!?

Chris: so they should be there.

Ken: No, no personal letters to Dianna or anything like that?

Chris: Oh yea, there's a personal letter that's the one I am talking about there's a I would say ah the January letter is probably a total of about seven pages. And that was the one that was that was the one that was sent to Dianna as well as a copy was given to Melvin, Melvin Bryant.

Ken: That's the one I want! That ought to be very helpful to understand where you're coming from. Now Melvin understand Melvin may ask you the same thing when I go back there and start to ask where this is and where that is (not understandable).

Chris: Got ya.

Ken: Ok are there any questions that you have of me or anything?

Chris: Not at this point no.

Ken: I am leaving tomorrow, I will be leaving out of this office to go to the other property so I will be there (not understandable).

Fred: When are we going to find out what you want.

Chris: Umm I would imagine my attorney is taking care of all that so um I would say fairly soon, once again I am not a [*sic*] attorney so um. At this point were [*sic*] focusing on on taking care of our health and getting back to to a suitable stance.

Fred: (not understandable)

Chris: yes. yea, we've – we've definitely had health issues from this so um and like I told Melvin when I met with him last week umm as well as when this all broke um that right now has been our primary concern. Ofcorse [*sic*] getting the stuff remedeated [*sic*] or what can be salvaged remediation is uh important to us as it would be any family but uh it's it's taking a far back seat to the other issues were [*sic*] trying to deal with right now so. Umm I'm not pressed and that's why in our letter we said

we understand as far as taking care of the safety and the welfare of the other people living around us umm do what you got to do if that means you have to move all our stuff out into storage containment units or what ever until we can get these other issues resolved, that's fine but honestly right now that's been kind of uh a back plate issue for me. Were you going to ask something?

Ken: I was going to say umm, and you may have been asked this on the property in (not understandable) can you tell me if you have insurance, renters insurance, do you guys have a policy of renters insurance at all, and the reason I say that is your [*sic*] going to be called on by an adjuster from our side,

Chris: I've already gotten the call yea, today, yea referred it to our attorney. Yea someone called and I gave her the attorneys [*sic*] name and all.

Ken: there [*sic*] going to come in their [*sic*] going to look at it and do what insurance people do, and I anticipate that they are going to also ask you the same questions that I meant to ask.

Chris: what's that?

Ken: Do you have renters insurance?

Chris: No.

Ken: Ok. I don't have anything else, you guys have anything?

Fred: Well you know were [*sic*] sorry you're having to go thru it.

Chris: I appreciate that, that's the first apology I've actually received so.

Fred: no – nobody wants to have to go thru it umm you know, I know its [*sic*] not fun uhh you know and – and we didn't uhh you know certainly from a corporate stand point in the event uhh if you did give us notice then umm we apologize about that to because uhh you know I mean as I said when I made my first comment this stuffs [*sic*] important I mean you know invesco's out spending ya know hundreds of thousands of dollars potentially uhh ya

know trying to do do and do what's right uhh and uhh uhh and that's the reason I wanted to come because by all means we want to be sure we have a policy that's in place that is you know good for our employees and uh in (not understandable) and were [*sic*] sorry you're having to go thru it.

Chris: I appreciate that.

Fred: If we had it to do over again then we try you know,

Ken: I second that and I know its [*sic*] awkward you being here, you probably feel like you're tag teamed.

Chris: you know, I mean I understand no I understand that you – you have

Fred: were [*sic*] not, were [*sic*] not, were [*sic*] not trying to tag team you, you know I'm here to (not understandable) to be sure again you know the policy makers for our company to be sure we write practices here that that work you know and that uh uhh

Ken: Both you need to write it down, I flew in Monday thinking that (not understandable) meeting –

Fred: Yea, johns got a (not understandable)

Ken: But I come in like quarterly or on a [*sic*] as needed basis and since this is at the forefront I am trying to get educated as anybody else is on this whole thing so.

Chris: Yea, I am at a loss for, to be honest with you for who any of you are but I am assuming your [*sic*] John Lebeau,

Ken: Yes, He's God of you,

Fred: I'm Fred Chancy, out of the Dallas office and I'm at the head of the company,

Ken: We're the (not understandable)

Fred: John, John works for me.

Ken: Invesco, Invesco is a Invesco mutual funds but there,

Chris: a [*sic*] asset management company,

Ken: Yes a [*sic*] asset management company, who then overlaps Lincoln and then the owners.

Chris: Ok, well then I will give him a call as far as these – do you have a number that you want these sent to or do you just them sent to your attorney?

Ken: Umm actually it would be great if you sent them to the attorney, now your [*sic*] talking about what?

Chris: Umm the umm the full report from Potomac environmental plus the because a bunch of pages from the microbial lab with the analysis and all.

Fred: If you can give copies make multiple copies at least two so you can make john and our group aware particular from my stand point more than any thing we want to understand what uhh you know you wrote you said on your seven page letter and didn't get any action back when did you say, January.

Chris: right well yea that letter was in response to a lack of action for quite some time but once again that's going back to that's going back to the file and going thru all that but if you want to give me numbers where you want this stuffs sent to and I can pass that on to him.

Ken: My fax number is 972-715-5816 my name is Ken last name is K-A-M as in Michael I-N-S-K-I and that's Invesco I-N-V-E-S-C-0 we, it would be helpful since everybody's kind of circling and talking I think it would be appripoe [*sic*] for a copy to be sent to Ken since your [*sic*] going to be talking anyway.

Chris: to who?

Ken: Ken Lapintine from Greenburig and then most important as well as myself would be. What were [*sic*] talking about Over [*sic*] to your office?

John: Over to my office.

Chris: Ok what's?

John: 703-834-6394

Ken: And again I am looking for any and all corispondance [*sic*] and what I'm looking for most is the full report of Potomac umm legible that I can see the spaces.

Chris: How do you spell your last name?

John: L-E-B-E-A-U.

Chris: I should have Know [*sic*] that took four years of French, got a French chef for a father so I should have known how to spell that. And then you are?

Fred: I am Fred Chaney C-H-A-N-E-Y

Chris: I've got the fax and everything on here.

Ken: I really apreciate [*sic*] you taking time to see us and I apoligize [*sic*] as well for the whole scenario and being late,

Chris: That's all right.

Ken: I mean time wise I'm not wearing a watch but I do know we made every effort we just were held at Westfield's and,

Chris: Well they keep me plenty busy here so that's not a problem.

Glen: I told him it would be sometime before lunch.

Chris: yea, I know what your [*sic*] saying there was no diffenat [*sic*] time so you asked me what time I took lunch and I said I don't typically take lunch I work straight thru so when ever you guys get here is fine so.

Ken: I will give you the rate that we obviously want to get to see the light at the end of the tunnel and I leave you with that.

Chris: Ok

Ken: now what ever way witch [*sic*] that is (not understandable) or if it's negoeation [*sic*] (not understandable)

Chris: right right.

Ken: that's my desire.

Chris: right, now obviously at this point where does,?

Fred: we want to get back at this point I mean do we know what you want.

Ken: yea I didn't put a time table cause I'm sure when your attorney talks to our attorney then I'll be going back to talk to (not understandable) they'll probably not want this to drag on for weeks, they'll probably want to say hey

how can we fix these few last items and one more time and what will make everybody feel confortable [*sic*] so we can get in and get this thing done. And in my mind it should be yesterday.

Chris: yea, I mean as far as the the as far as the number number seven on there that's an easy address we don't need to go in there I can tell them what the items that they've already told us in the last meeting that could not be saved that we want to have hemetrically [*sic*] sealed and they can bag the up and tripple bag them like our environmental guy said can be done for transport and we can take them over to this place that does the hernetric [*sic*] sealing and they can deal with it from there, um there [*sic*] whole thing with that was last time I met with them he said look if there's a few personal item's that you want to get out of there we can suit you up you can go in there you can grab them we can bag them up, which is why I put that in there. I don't care if I go, I'd prefer not to go back in there even if I'm fully suited up. As long as we can get –

Ken: we cant [*sic*] let you go in there but we may be able to take some of the items – have you provided a list?

Chris: no, its [*sic*] four items it's a file-locked file box, it's my wife's bouqet [*sic*] from our wedding in September that cant [*sic*] be saved, or ring pillow, and a [*sic*] old pink stuffed animal that's on my sons bed that was my wife's when she was a kid.

Ken: say again – file box, ring pillow,

Chris: Her bouqet [*sic*] –

Ken: Her bouqet [*sic*] –

Chris: yea theres [*sic*] a couple bouquets in there but hers is umm I'd have to get the colors from her which was hers but –

Ken: Ok then what else?

Chris: and then a [*sic*] old umm floppsey Charlie, a [*sic*] old doll an old stuffed pink dog that's on my sons [*sic*] bed.

Ken: a stuffed pink dog.

Chris: yea.

Ken: I'll work on this and get file box, ring pillow, bouqet [*sic*], old stuffed –

Chris: the file box the ring pillow the bouquet and the and the stuffed animal.

Ken: and the stuffed pink dog! Would one know where the file box is?

Chris: yea it's in the closet, it's setting [*sic*] in the closet actually by her wedding dress

Ken: Ok and the ring pillow is in there?

Chris: No, it's in a uhh curio in one of the big lit book shelves in the living room.

Ken: Bouqet? [*sic*]

Chris: it's there to.

Ken: Ok umm

Chris: It's like a shelf set up with all that stuff.

Ken: and the old stuffed pink doll is in your son [*sic*] room?

Chris: It's on the bunk bed yea back in the third bedroom.

Ken: Ok I think –

Chris: and basically what were [*sic*] looking for is just to have them –

Ken: encapsulated temporarly [*sic*]

Chris: encapsulatd temporarly [*sic*] until we can get it to this place that we found that does hemetric preservation that basicly [*sic*] seals stuff. So nothing can get out but obviously it's sentimental stuff so.

Ken: I think I can work that out I cant [*sic*] garentee [*sic*] let me make some phone calls –

Chris: right

Ken: and either way it goes will you give us a phone number or?

Chris: yea, the number here is umm let me get it from them actually

Glen: 703-

Chris: No, in my unit here

Ken: oh ok.

Chris: I've got to get it from some one out front here. Hey Ben do you have the phone number for the guest suite that I'm staying in here.

Response: umm yea I have it out front wasent [*sic*] on the phone?

Chris: no not on the phone, I got it once two weeks ago and gave it out to a couple of people but its 421 something.

Response: Does it work.

Chris: yea the two people I gave the number to have called me so we've got a [*sic*] answering machine on there now.

Response: you should be there the rest of the month

Chris: probably a lot longer than that. I am sure you'll get a [*sic*] update at some point

Response: what ever you want it doesn't matter to me, we love it admins paying so I'm smiling do you know what I mean. Were [*sic*] happy that somebodys [*sic*] in it because were [*sic*] paying like almost four hundred dollars a month for that crappy furniture in there.

Chris: I'd talk to them about that.

---(long pause)---

Chris: come on I don't want to keep the president of the company waiting here.

Response: If you want to go back in there I'll uhh knock on the door and bring it back in just a minute I mean.

Chris: It's allright it gives me a breather.

Response: (different voice) umm 703-421-6186

Chris: 421-1760 Ok thanks I aperacate [*sic*] it.

Chris: ok its [*sic*] 703-

Ken: this is?

Chris: This is the phone number where I'm staying and weve [*sic*] got a computerized answering machine on there if were [*sic*] not there.

Ken: Ok 703

Chris: 421-1760

Ken: now what I'm going to do is like I said is get back and make phone calls see what I can do on this and weather [*sic*] I can or I cant [*sic*] I'll leave you a message and tell ya if I can or cant [*sic*] do it, ok umm that's it I don't have anything. I know I keep saying that.

John: I apreceate [*sic*] this and I apologize for it

Chris: No problem.

Fred: ok good to see you

Chris: Ok!

Question: was that allright?

Chris: yea, yea apreceate [*sic*] it thank you.

End of transcription

VERY IMPORTANT ——— (NEXT CTRLY AUGUST + SEPTEMBER)

Summit Village Apartments

From: "Melvin Bryan" <MBryan@lpsi.com>
To: "Lincoln at Fairoaks MID-ATL APTS" <lincolnatfairoaks@erols.com>; <mtlaurelcrossing@erols.com>; <mty1@erols.com>; <NJsouth@erols.com>; <applebriar@lincolnapts.com>; <ashfordmeadows@lincolnapts.com>; <harbourgates@lincolnapts.com>; <Liberty Park@lincolnapts.com>; <libertyPark@lincolnapts.com>; <lincolnatfairoaks@lincolnapts.com>; <lincolnwoods@lincolnapts.com>; <mayfaire@lincolnapts.com>; <mgrfairfaxcorner@lincolnapts.com>; <mgrgatesofmclean@lincolnapts.com>; <mgrhermitage@lincolnapts.com>; <mgrpotomacfalls@lincolnapts.com>; <mgrpotomacplace@lincolnapts.com>; <mgrpotomacyard@lincolnapts.com>; <mgrsenecaclub@lincolnapts.com>; <njnorth@lincolnapts.com>; <opmanager@lincolnapts.com>; <riverpointe@lincolnapts.com>; <senecaclub@lincolnapts.com>; <summitvillage@lincolnapts.com>; <Treetops@lincolnapts.com>; <Villageatfoxpoint@lincolnapts.com>; <westfieldvillage@lincolnapts.com>; <windsoratfairlakes@lincolnapts.com>
Cc: "Diana Penn" <dianapenn@erols.com>; <summitvillagemaint@hotmail.com>; <opmaintenance@lincolnapts.com>; "Glenn O'Brien" <GOBRIEN@lpsi.com>; "Rick Leith" <LEITH@lpsi.com>; "Lana Zylka" <lzylka@lpsi.com>; "Peggy Reynolds" <PReynolds@lpsi.com>
Sent: Wednesday, July 11, 2001 10:52 AM
Attach: Mold PM walk sheets.xls
Subject: Important Policy Change

April Aug

212

Business Managers- Please print for the Lead Technicians

In response to the mold situation that is sweeping the nation, it has become necessary for LPC to become even more pro-active in protecting the assets, investors, asset management groups and our own interest from exposure to this type of liability. Right or wrong, the way we used to handle leaks and mold problems in property management is gone forever. Mold can develop from various sources such as roofs, plumbing, appliances, etc. In the case of Stachybotrys, when the mold reproduces it develops toxic spores and an unhealthy environment.

Therefore, it is extremely important that each community conduct a unit by unit inspection for mold and sources of leaks. If you have not yet conducted your 3rd quarter filter changes, now would be the ideal time to do it. It is advisable to notify the residents that we will be checking every sink, toilet, hot water heater, patio/balcony storage rooms, HVAC closets. The notice should not mention mold but rather that we are conducting leak checks.

I know this is a busy time of the year but this needs to get started as expeditiously as possible. Communities close together can combine staffs to make the process go much quicker. I have attached a PM form that is the only form to be utilized during these inspections.

I will need a report from each property as to when this process will start and I will need copies of all documentation throughout the process. I might also make you aware that the Quarterly On-Site Inspection form has been revised for check off for this inspection and other mold related issues totaling 75 points.

Thanking you in advance for your support and cooperation.

Melvin Bryan
Regional Maintenance Director
703 834-1900
MBryan@LPSI.com

Today

-waiting for 104's approval

Jason - physical inspections
no prior notice, leave card in apt
take photos of work as it is done

2 units, isolated
further inspections



! Do not distribute or make reference to the policy !

Ken will be out M-W @ 12 noon
↳ Saturday

Only Invesco talks to attorneys
Meet to Rotn w/ Invesco

- Dryclean everything or launder everything
not both, one or the other
If something is damaged it would get replaced

PCO clearing process

- Get another storage unit for questionable items

Redacted

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AFFIDAVIT

STATE OF VIRGINIA
COUNTY OF FAIRFAX, to-wit:

I, Diana Coleman, after having been first duly sworn according to law, state under oath, as follows:

On February 19, 2003, I called Jerry M. Phillips about a recent development with the leaks we had discussed with him the previous weekend, as well as the other problems that we had with Lincoln. These leaks had been ongoing since November of 2002, approximately one month after my husband and I moved in. Service staff have failed to address or correct these problems to this date. Upon this most recent leak on Tuesday evening, February 18, 2003, to Wednesday, February 19, 2003, the leak was producing buckets of water. They sent Melvin Bryan to my unit to investigate. When I spoke with Mr. Bryan after he presented himself with his card, and I questioned him, he stated that he knew nothing about any leak problems at our unit, or that there had been any problems in the past, and that he or they, meaning Lincoln, had to decide what to do in the unit. I used numerous towels and other items to try to sop up the water as it was leaking, and keep the leak from spreading all throughout our unit. The water reached the linen closet where last weekend it was discovered that toxic mold still existed in the walls. Mr. Ginste, of Potomac Environmental, performed that test. The responding service technician originally blamed the leak on the air conditioning unit which was odd because I don't use my air conditioner: it is the middle of winter, and shortly after a huge snow storm. When my husband and I looked to identify exactly where the leak was coming from, we opened the door and looked inside the HVAC closet and saw that the leak was coming from where the pipes come out of the wall on the right hand side. We pointed this out to Gilbert, the responding service technician, and Gilbert said he didn't need to knock the wall down. Then a call came through from someone named Joe

to knock it down. Now, the wall has been knocked down and the pipes are exposed. Lincoln brought in three large industrial fans to dry out the unit. The carpet has been torn up and the padding has been torn up from the floor to try to get the cement dry. Upon looking in the HVAC closet when we were talking with Mr. Phillips on the telephone, my husband noticed a very strong mildew smell coming from the large hole that had been knocked in the wall of the HVAC closet. This is the same location that we've been experiencing leaks since approximately last November. My husband and I would like to be removed from this unit and placed in a safe and habitable dwelling. We are here only temporarily until our home in Culpeper, Virginia, is completed. It is currently under construction. Our short time spent in this unit operated by Lincoln has been a nightmare. We have turned in numerous service requests to Lincoln for items needing repair and have received no satisfactory responses or repairs for most of these items. We were never informed that our unit had been subject to a remediation for toxic mold exposure just before our occupancy. Instead, when we looked at the unit and prepared to sign the Lease, Lincoln told us that the previous tenants before us had trashed the unit and knocked holes in the walls, etc., and that Lincoln had to do extensive amounts of repairs to get it ready for the new tenants, ourselves. This day we have now been informed that toxic molds are still present in the same locations as when the Roche family lived here prior to the remediation. Laboratory tests have confirmed these facts.

/s/ Diana Coleman (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

Subscribed and sworn to before me in the jurisdiction aforesaid this 20th day of February, 2003.

[notary omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

Tuesday, February 11, 2003
Fairfax, Virginia

Deposition of:

WILLIAM RAY TRAVELSTEAD

a witness, called for examination by counsel on behalf of the Plaintiffs, pursuant to notice, taken at 10513 Judicial Drive, Suite 100, Fairfax Virginia 22030, beginning at approximately 4:30 o'clock p.m., before Gustave G. LaCroix, Jr., Verbatim Reporter and Notary Public in and for the Commonwealth of Virginia, at Large, when there were present on behalf of the respective parties:

* * * * *

[30]

* * * * *

BY MR. PHILLIPS:

Q Did you – But you didn't participate in fixing it up, though?

A Not do any of that, no.

Q You and Mr. Roche used to talk about your work; did you not?

A Yes.

Q Did Mr. Roche tell you about his problems that he was having with water leakage and water intrusion in his apartment?

A He mentioned something about the leak.

Q Did he tell you about the mold in his apartment?

A Yes.

Q What did he tell you about that?

A I don't recall, but I – he did say something.

Q But you and he had conversations about that, didn't you?

A Yes.

Q Now, did you ever discuss with him the mold policy of Lincoln?

[31] A We probably did.

Q Okay. Did you ever discuss about whether it was right or wrong to not tell the residents, that is the tenants, about having mold discovered in their units?

MS. VOSSLER: Objection.

BY MR. PHILLIPS:

Q Did you have conversations about that?

A Yes.

Q Okay. And both of you thought it was not proper not to tell the tenants; didn't you?

A Yes.

MS. VOSSLER: Objection.

BY MR. PHILLIPS:

Q The answer is yes; right?

A Yes.

Q And do you remember any other comments that you and he used to discuss about, you know, those mold problems besides of what I've just talked about?

A No.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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* * * * *

[17]

* * * * *

[BY MR. PHILLIPS:]

Q Did you ever see a – or memo that you saw that said don't tell the tenants about the mold; just go and fix their HVAC units?

A Yes.

Q And did the policy or the memo say don't do this when the tenants are at home?

A I think it said don't check – if you – When you go in to do a work order, don't check the HVAC closet if the resident is at home.

Q Why?

A They didn't say why. They just said –

Q Told you not to do it in front of them?

A Yes.

Q And so most of the checking, if you did it, you had to wait until they weren't around?

A Correct – or you won't – you just didn't check it.

Q Until they were gone?

A Well, you wouldn't go back, unless they [18] put in another work order.

Q Now, when you worked on mold or removing it yourself and you used this beach [*sic*] solution, did you tell the tenant when they weren't there that you [*sic*] removing mold?

A When they weren't there?

Q Yes.

(Whereupon, the witness gestured with his head.)

MR. PHILLIPS: Did you ever go back and tell them?

THE COURT REPORTER: I'm sorry. I'm sorry. You shook your head in the negative. Did you tell them –

MR. PHILLIPS: I'll rephrase the question. Yes, he did.

MS. VOSSLER: You have to give a verbal answer.

THE WITNESS: Okay.

BY MR. PHILLIPS:

Q When you went in to fix the mold, on the times you did it, were the tenants there?

A I'm sure they were at some point.

[19]

Q Did you ever tell them what you were doing?

A No.

Q And wasn't it the policy of Lincoln, the mold policy, not to discuss those issues with the tenants?

A. Correct.

* * * * *

LPC employees to wear Safety Eqmt

book
- We are to remove valuables for them:
  to include money
  jewerly
  guns
  documents

- we are to get all clothing + linens dry cleaned and/ or laundered

- Resident can bring 3-days of clothes @ $500 each (per person)

- we are to do itemized list of all belongings (video tape), have resident sign off on

- change locks for residents protection

- Belongings to be cleaned + stored here on property. Access through office.

- ≈ 6 wks

- Okay to terminate lease
- Document all conversations
- Melven
  bullet form March 8 to today
  just facts

March, 20, 2002

To: Westfields Village, Lincoln property Company
Regional Property Manager
Regional Director of Maintenance

As per our conversation this evening March 20th, 2002, regarding the remediation of our personal property as well as the apartment at 5111 Woodmere Dr #104, we do not give our consent for any attempt at remediation of our personal property until we know it can be achieved, and will be done properly. We will need the name of the qualified company, Their Adderss [*sic*], phone number, a contact person and what qualifications they have to handle this type of situation. A full report on the methodology they plan to implament [*sic*], as well as information and references proving their systems [*sic*] ability to provide a complete remediation.

Further exposure to ourselves and family is not a risk we are willing to take, therefore upon receiving this information we will review it with the appropriate parties and inform you of our decision.

We understand that in order to protect the safety and health of our neighbors in building 5111 you need to begin the remediation prosses [*sic*] on apartment #104. Knowing this, we give our permission only to relocate our property into a storage unit with the understanding that you are liable for any damaged or missing items. A full inventory of our personal property will need to be performed as it is removed, so arrangments [*sic*] will need to be made with us to achieve this. Please be aware that many of the items are antiques, collectables and/or sentamental [*sic*] from of [*sic*] wedding and other occasions, these items are unable to be replaced so please use care when moving them.

In closing, let this serve as notice, Our personal property is Not to be removed until arrangements have been made by you with us for a complete inventory, and No at-

tempt at remediation is to be performed on our personal property until you have received our written and signed approval based on our review of the company information required above.

Signed,

/s/ JUANITA M. CASTILLO-ROCHE
Juanita M. Castillo-Roche

Chrisophe [*sic*] W. Roche
/s/ CHRISTOPHE ROCHE

Copy to: Westfields Village Business Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Apr. 22, 2003]

PLAINTIFFS' MOTION TO REMAND PURSUANT TO 28 USC §1447(c)

Pursuant to 28 USC §1447(c), the Plaintiffs hereby motion the Court to remand the above captioned action back to the Fairfax County Circuit Court. In support of their Motion, plaintiffs respectfully refer the Court to the attached Memorandum in Support.

1. If at any time before a final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded. 28 USC §1447(c). Pursuant to Order entered by The Honorable Gerald Bruce Lee on April 16, 2003, the Court directed that the Order did not constitute a "judgment" as defined in Federal [*sic*] Civil Procedure §54(a).

2. On September 17, 2002, defendants' Lincoln Property Co., Invesco Institutional, and SWIB Investment Company filed a Notice of Removal from the Fairfax County Circuit the above-referenced action with the Clerk of the United States District Court for the Eastern District of Virginia. The removal action was based on the

claim that the defendants were of diverse citizenship, and that none of the defendants were citizens or residents of the Commonwealth of Virginia, and that this Court had jurisdiction to hear the subject matter of this action pursuant to 28 USC §1332, and 1441(a).

This Court does not have subject matter jurisdiction because defendant Lincoln, is not a Texas Corporation, as alleged by defendant Lincoln, and as set forth in the attached Memorandum in Support, is not a Corporation at all, but rather a Partnership.

3. Defendants intentionally represented that "Lincoln Property Co." was a Texas Corporation with its principle [*sic*] place of business in Texas. In fact, defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners residing in the Commonwealth of Virginia. The defendants' allegation that there was diversity of citizenship jurisdiction as the basis of their removal was a misrepresentation.

WHEREFORE, this action was never removable because it did not fall within the original diversity jurisdiction of this Court under 28 USC §1332 and 1441(a). The District Court lacks subject matter jurisdiction, and in accordance with 28 USC § 1332 and 1441(a). The District Court lacks subject matter jurisdiction, and in accordance with 28 USC §1447(c), "the case shall be remanded." Plaintiffs further request that in the Order remanding the case, that defendant Lincoln be required to make payment of just costs and all actual expenses, including attorney's fees, incurred as a result of the removal, all pursuant to 28 USC §1447(c). It is further respectfully requested that a certified copy of the Order of Remand be mailed to the Clerk of the Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia 22030, permitting that Court to thereupon proceed with this action. (In accordance with §1447(d), the entry of the Order remanding to the Fairfax County Circuit Court from which it was removed, is not reviewable on appeal or otherwise, as this

was not a case removed pursuant to §1443 of Title 28.) 28 USC §1447(d).

Because there is not complete diversity between the plaintiffs and the defendants, it is accordingly requested that the Court grant this Motion to Remand, dismissing this matter and voiding all Orders and Motions granting relief to defendants in this cause, for want of subject matter jurisdiction.

Respectfully submitted,

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703) 385-2745
Virginia State Bar No. 9211

[certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed Apr. 22, 2003]

MEMORANDUM IN SUPPORT OF MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION

I. SUMMARY OF RELIEF REQUESTED:

If at any time prior to final judgment it becomes clear that the removal court lacks subject matter jurisdiction, the removal court must remand the case to the state court from which the defendants originally removed the case. 28 USC §1447(c). If the Federal Court lacks subject matter jurisdiction, remand is mandatory and not reviewable on appeal. The Court strictly construes removal status because of federalism concerns. Where the need to remand is not self-evident, the Court must resolve any ambiguities concerning the propriety of removal in favor of remand.

For the reasons stated below, it is clear that there is a lack of subject matter jurisdiction because the numerous entities of Lincoln Property Co., including the one that is managing Westfield Village and accepting the management payments are not Texas Corporations. In actuality,

it is a partnership conducting business in the Commonwealth of Virginia. This partnership has a Virginia resident partner, and the defendants cannot meet the United States Supreme Court longstanding bright-line rule limiting corporate citizenship to corporations. Non-corporate entities are treated as partnerships, which carry the citizenship of their members. Furthermore, neither Lincoln Property Company nor Lincoln Property Co., are registered through the Virginia State Corporation Commission to transact business in this Commonwealth. (See Tab 2). In fact, the entity identified by defendants' counsel as EQR/Lincoln Limited Partnership (entity accepting management payments for Westfield Village) is registered through the Virginia SCC as a current partnership conducting business in this Commonwealth. (See Tab 3).

Courts uniformly hold that a relevant factor for imposing costs and expenses is whether the removing party contradicts well-settled law in attempting to remove the case to Federal Court. Where non-removability is contrary to well-settled law, the courts regularly impose costs and expenses as a result of the removal. [Please see the April 8, 2003, recently decided case of *Pauline Johnson-Brown, et al., v. 2200 M Street, LLC, et al.*, 2003 US Dist. LEXIS 5947, attached behind Tab 1.]

II. ARGUMENT:

The removal of civil cases to federal court infringes state sovereignty. Consequently, courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 US 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). Assuming that the defendants establish the jurisdictional requirements of 28 USC §1441, the removal statute, by filing a Notice of Removal within 30 days after service of the initial pleading in the Fairfax County Circuit Court, "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 USC §1447(c). The Notice of Removal filed in the Fairfax County Circuit Court,

and attached hereto under Tab 4, alleged that the action was removable because it fell within the original diversity jurisdiction of this Court under 28 USC §1332 and 1441(a). At paragraph 5 of the Notice of Removal, defendants allege that Lincoln was not incorporated in the Commonwealth of Virginia, nor does it have a principle [*sic*] place of business in the Commonwealth of Virginia. "Rather, Lincoln is a Texas Corporation with its principle [*sic*] place of business in Texas." In fact, defendants knew that the Lincoln Property Co., entity accepting payment for managing Westfield Village known as EQR/Lincoln Limited Partnership was not even a Corporation authorized to do business as a corporation in the State of Virginia. It was in fact a partnership registered as such through the Virginia State Corporation Commission for such purposes. Supporting this fact are the following:

A. In the deposition of Fred E. Chaney, the 30(b)(6) organization designee for Lincoln Property Co., pursuant to Federal Rule of Civil Procedure, he testified that the organization was a partnership (See Tab 5 for deposition of Fred E. Chaney, taken on February 13, 2003). He testifies at page 4 that he is the property manager for Lincoln Property Co., and Senior Vice President. On the same page, he testifies that it is a partnership and it does not have a board. At page 18, he advises that he works for the partnership, and that other partnerships in Lincoln, on the commercial side of the company, manages assets for Invesco. When asked, at page 19, "is Lincoln owned or is it a subsidiary of a larger company?" He responds at P.19, "No." At page 21, he is questioned, "And is it not a publicly offered entity since it is a partnership, am I correct?" He answers, "Correct." At page 28, he advises that the company is in partnership and ownership with other partners that own assets that are also managed by Lincoln. On the same page, he advises that approximately 25 percent of the properties they manage are subject to partnership ownership. At pages 30 and 31 of his deposition, he testifies that Lincoln is in partnership ownership of two other apartment complexes in Virginia. (See Tab 5).

B. Deposition of John LeBeau, Vice President of the Mid-Atlantic Regional Division of Lincoln, taken on March 3, 2003, attached under Tab. 6. At pages 19-21, Mr. LeBeau identifies Jeff Franzen as a Senior Vice President, partner, in Lincoln Property Co.

C. Lincoln Property Co., Website, identifying at page 3, Jeff B. Franzen, Senior Vice President – Mid-Atlantic, the partner referred to by Mr. LeBeau in Lincoln Property Co. (See Tab 7).

D. Certificate of Virginia State Corporation Commission certifying that Lincoln Property Co., and Lincoln Property Company are not authorized nor registered as Foreign Corporations to conduct business in the Commonwealth of Virginia. The Certificate of the Virginia State Corporation Commission is also enclosed showing that EQR/Lincoln Limited Partnership is an authorized and registered partnership authorized to conduct business in the Commonwealth of Virginia. (Tabs 2 and 3). Furthermore, in the financial interest disclosure statement filed pursuant to Local Rule 7.1 of the Eastern District of Virginia to enable judges and magistrate judges to evaluate possible disqualification or recusal (See Tab 11) defendants' Lincoln certified through its counsel that there were no parents, trusts, subsidiaries, and/or affiliates of said party that had issues [*sic*] shares or debt securities to the public. This couldn't be further from the truth. It has been discovered through investigations of this matter and defendants' own admissions and testimony that Lincoln enjoys a partnership with Equity Residential (EQR). Lincoln and EQR have current partnerships on two Northern Virginia properties, and had a third partnership that has since been dissolved. (See Chaney's deposition, Tab 5, pages 28-31). Lincoln owns approximately 25 percent of these two current properties and acts as the property manager. (See Tab 8). These properties are The Reserve at Potomac Yard in Alexandria, Virginia, and The Reserve at Town Center in Potomac Falls, Virginia. The third property was known as The Reserve at Fairfax Corner, and Lincoln has since sold its interest to EQR in this

property. (See Tab 9). It is clear Lincoln formed a partnership as named above for these business transactions. Equity Residential, a known REIT (Real Estate Investment Trust), as evidenced by page 25 of Mr. Chaney's deposition (under Tab 5), is traded on the New York Stock Exchange as EQR. Surely, defendants and their counsel when filing the Rule 7.1 financial interest disclosure realized that this Trust, and Affiliate of Lincoln issued shares and/or debt securities to the public. (See Tab 10). Plaintiffs believe this and the other information contained in this filing clearly demonstrates a fraud on this Honorable Court.

E. Defendant Lincoln Property Co.'s initial disclosures pursuant to Rule 26(a)(1), at page 2 of its disclosure, Lincoln identifies Jeff B. Franzen as "Senior Vice President/Partner." (See Tab 12). Letter of Connie N. Bertram, dated March 18, 2003, disclosing the financial information concerning Lincoln Property Co., for purposes of showing financial worth for punitive damage assessment in which defendants' counsel advises that "EQR/Lincoln Limited Partnership, is the entity that receives the management fees for Westfield Village Apartments." (See Tab 13). This along with Senior Vice President Chaney and Regional Vice President LeBeau's testimony demonstrates that the Lincoln entity subject to the plaintiffs' filing of their Complaint is in fact partnership, not a corporation.

F. Fairfax County Tax Assessment Office records and Fairfax County Deed, Deed of Trust, records showing that Senior Vice President/Partner, Jeff B. Franzen, is a resident of Fairfax County, Virginia. (Tab 14).

G. Letter of February 20, 2003, with attached signed affirmation of Jeff B. Franzen, where he certifies and affirms under penalty of perjury, that he is the "Senior Vice President/Partner for defendant Lincoln Property Co. ("Lincoln") and that I am authorized to act for Lincoln . . . ." (See Tab 15).

[Part III omitted]

Respectfully submitted,

/s/ JERRY M. PHILLIPS
Jerry M. Phillips, Esq.
PHILLIPS, BECKWITH, HALL & CHASE
10513 Judicial Drive, Suite 100
Fairfax, Virginia 22030
Telephone: (703) 691-4100
Facsimile: (703)-385-2745
Virginia State Bar No. 9211

[certificate of service omitted]

Commonwealth of Virginia

State Corporation Commission

234

I Certify the Following from the Records of the Commission:

LINCOLN PROPERTY CO. is not the name of any corporation existing under the laws of Virginia or of a corporation holding a certificate of authority to transact business in Virginia.

Nothing more is hereby certified.

Signed and Sealed at Richmond on this Date:
April 21, 2003

Joel H. Peck

Joel H. Peck, Clerk of the Commission

CIS0502

Commonwealth of Virginia

State Corporation Commission

I Certify the Following from the Records of the Commission:

235

Lincoln Property Company is not the name of any corporation existing under the laws of Virginia or of a corporation holding a certificate of authority to transact business in Virginia.

Nothing more is hereby certified.

Signed and Sealed at Richmond on this Date:
April 21, 2003

Joel H. Peck

Joel H. Peck, Clerk of the Commission

CIS0316

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
Including professional corporations

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OFFICES IN

WASHINGTON, D.C.
MARYLAND
VIRGINIA

VENABLE
ATTORNEYS AT LAW

Connie N. Bertram
(202) 962-4855
cnbertram@venable.com

March 18, 2003

VIA FACSIMILE AND REGULAR MAIL

236

Jerry M. Phillips
Phillips, Hall, Beckwith & Chase
10513 Judicial Drive, Suite 100
Fairfax, VA 22030

Re: Christophe Roche, et al. v. Lincoln Property Co., et al.,
United States District Court for the Eastern District of Virginia,
Civil Action No. 02-1390-A (JBL)

Dear Jerry:

I am writing in response to your March 13, 2003 letter requesting information concerning Lincoln's financial statements. Lincoln is willing to enter into a stipulation regarding the following financial information concerning EQR/Lincoln Limited Partnership, the entity that receives the management fees for Westfield Village Apartments:

	2001 (audited)	2002 (unaudited)
Net worth/book value	$7,759,939	$8,655,790
Revenue from Management Fees	$19,884,710	$17,353,301
Other Revenue	$17,258,929	$ 7,535,277
Total Revenue	$37,143,639	$24,888,578

I believe that this proposed stipulation addresses each of the categories of information requested in your March 13, 2003 letter. If this proposal is acceptable, I will amend the parties' proposed pre-trial stipulations to include this information.

Thank you for your assistance with this matter.

Sincerely,

Connie Bertram /NSC

Connie N. Bertram

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 30, 2003]

OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

[text, signature block, and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 29, 2003]

DECLARATION OF DAN M. JACKS

Dan M. Jacks, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am the General Counsel and Vice President of Lincoln Property Company ("Lincoln"). Furthermore, I am the General Counsel, Vice President and Assistant Secretary for Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc.

3. Lincoln is located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 75201. Lincoln is a Texas corporation with its principal place of business located in Dallas, Texas. I have attached hereto true and accurate copies of Lincoln's certificate of existence and Articles of Incorporation. See Ex. A.

4. On November 13, 1997, EQR/Lincoln Limited Partnership was formed pursuant to the Delaware Revised Uniform Limited Partnership Act, 6 Delaware Code,

Chapter 17. I have attached hereto a true and accurate copy of EQR/Lincoln Limited Partnership's Certificate of Limited Partnership and relevant portions of the EQR/Lincoln Limited Partnership agreement. See Ex. B.

5. The partners of EQR/Lincoln Limited Partnership are Lincoln Eastern Management Corporation, a Texas corporation with its principal place of business in Dallas, Texas, and Lincoln Placeholder Limited Partnership, which is a Texas Partnership. I have attached hereto true and accurate copies of Lincoln Eastern Management Corporation's certificate of existence and Articles of Incorporation, see Ex. C, and Lincoln Placeholder Limited Partnership's Certificate of Limited Partnership and relevant portions of its partnership agreement. See Ex. D.

6. Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., which is a Texas corporation with its principal place of business in Dallas, Texas. I have attached hereto a true and accurate copy of Lincoln E.C.W. Property Management, Inc.'s certificate of existence and Articles of Incorporation. See Ex. E.

7. Lincoln Eastern Management Corporation and EQR/Lincoln Limited Partnership are successors in interest to the apartment management business that was conducted by Lincoln and certain other affiliates until 1991. Lincoln, however, allows Lincoln Eastern Management Corporation and EQR/Lincoln Limited Partnership to use its tradename and trademark.

8. Jeff B. Franzen is not a partner in EQR/Lincoln Limited Partnership. Rather, Franzen is Vice President of Lincoln Eastern Management Corporation. Franzen is referred to as a "partner" at Lincoln because he is a partner in several Texas limited partnerships that own residential properties. However, Franzen is not a partner of any entity that managed and/or collected fees pursuant to a management agreement for Westfield Village.

9. Westfield Village is an apartment complex in Centreville, Virginia that is owned by Defendant SWIB. EQR/Lincoln Limited Partnership receives management fees from SWIB for managing Westfield Village apartments.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

April 29, 2003
Date

/s/ DAN M. JACKS
Dan M. Jacks

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Articles of Incorporation for LINCOLN PROPERTY COMPANY (filing number: 48121700), a Domestic Business Corporation, was filed in this office on June 28, 1979.

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It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

242

LINCOLN PROPERTY COMPANY
Filing Number: 48121700

Articles of Incorporation	June 28, 1979
Articles of Amendment	December 16, 1980
Change Of Registered Agent/Office	January 06, 1985
Change Of Registered Agent/Office	July 13, 1990

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

THE STATE OF TEXAS

Gwyn Shea

Gwyn Shea
Secretary of State

ARTICLES OF INCORPORATION

OF

LINCOLN PROPERTY COMPANY NO. 1, INC.

FILED
In the Office of the
Secretary of State of Texas
JUN 28 1979

The undersigned natural person of the age of eighteen years or more, acting as incorporator of the corporation under the Texas Business Corporation Act, does hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is LINCOLN PROPERTY COMPANY NO. 1, INC.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized is to engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is ten thousand (10,000) shares of $ 1.00 par value common stock. Such shares shall not have cumulative voting rights, and no shareholder shall have any preemptive rights to subscribe for or acquire unissued or treasury shares of the corporation.

ARTICLE FIVE

The corporation will not commence business until it has received for issuance of its shares consideration of the value of One Thousand Dollars ($ 1,000.00), consisting of money, labor done or property actually received, which sum is not less than One Thousand Dollars ($ 1,000.00).

ARTICLE SIX

The street address of its initial registered office is Republic National Bank Building, c/o C T Corporation System, Dallas, Texas 75201, and the name of its initial registered agent at such address is C T CORPORATION SYSTEM.

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the by-laws. The directors, constituting the initial board of directors who are to serve as directors until the first annual meeting of the shareholders or until successors are elected and qualified are:

NAME	ADDRESS
Mack Pogue	1900 Two Turtle Creek Village Dallas, TX 75219
Wm. M. Bannister	1900 Two Turtle Creek Village Dallas, TX 75219

ARTICLE EIGHT

The name and address of the incorporator is:

NAME	ADDRESS
Delanie D. Montfort	206 West 13th, Suite A Austin, TX 78701

IN WITNESS WHEREOF, I have hereunto set my hand, this 29th day of June, 1979.

Delanie D. Montfort
Delanie D. Montfort

Sworn to June 28, 1979.

Cheryl M Roberts
Notary Public for Travis County, TX

CHERYL M ROBERTS
Notary Public in and for Travis County, Texas
My Commission Expires October 4, 1980

FILED
DEC 16 1980
CLERK RJ
Corporation Division

ARTICLES OF AMENDMENT

TO THE

ARTICLES OF INCORPORATION

OF

LINCOLN PROPERTY COMPANY NO 1., INC.

--ooOoo--

Pursuant to the provisions of Art. 4.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

ARTICLE ONE. The name of the corporation is

LINCOLN PROPERTY COMPANY NO 1., INC.

ARTICLE TWO. The following amendment to the Articles of Incorporation was adopted by the shareholders of the corporation on December 9, 1980:

Article One of the Articles of Incorporation is hereby amended so as to read as follows:

"One. The name of the corporation is
LINCOLN PROPERTY COMPANY"

ARTICLE THREE. The number of shares of the corporation outstanding at the time of such adoption was one thousand (1,000); and the number of shares entitled to vote thereon was one thousand (1,000).

ARTICLE FOUR. The holder of all of the shares outstanding and entitled to vote on said amendment has signed a consent in writing adopting said amendment.

Dated December 13, 1980.

LINCOLN PROPERTY COMPANY NO 1., INC.

By _____
Vice-President

And _____
Secretary

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STATE OF TEXAS.

COUNTY OF DALLAS.

I, ELLEN T. NOYES , a Notary Public, do hereby certify that on this 12th day of December, 1980, personally appeared before me E. E. MOORE , who declared he is VICE PRESIDENT of the corporation executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public for Dallas County, Texas

(NOTARIAL SEAL)

My Commission Expires: 12/28/80

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Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EQR/LINCOLN LIMITED PARTNERSHIP" IS DULY FORMED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FOURTH DAY OF APRIL, A.D. 2003.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE BEEN PAID TO DATE.

247

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

2821007 8300

030266436

AUTHENTICATION: 2381415

DATE: 04-24-03

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "EQR/LINCOLN LIMITED PARTNERSHIP" AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF LIMITED PARTNERSHIP, FILED THE THIRTEENTH DAY OF NOVEMBER, A.D. 1997, AT 4:30 O'CLOCK P.M.

CERTIFICATE OF CORRECTION, FILED THE NINETEENTH DAY OF NOVEMBER, A.D. 1997, AT 3 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID LIMITED PARTNERSHIP.

248

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

2821007 8100H

030266436

AUTHENTICATION: 2381414

DATE: 04-24-03

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 04:30 PM 11/13/1997
971388571 - 2821007

CERTIFICATE OF LIMITED PARTNERSHIP
OF
EQR/LINCOLN LIMITED PARTNERSHIP

The undersigned, desiring to form a limited partnership pursuant to the Delaware Revised Uniform Limited Partnership Act, 6 Delaware Code, Chapter 17, do hereby certify as follows:

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I. The name of the limited partnership is EQR/Lincoln Limited Partnership.

II. The address of the Partnership's registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, Wilmington, County of New Castle. The name of the Partnership's registered agent for service of process in the State of Delaware at such address is The Corporation Trust Company.

III. The name and mailing address of each general partner is as follows:

Lincoln Eastern Management Corporation
P. O. Box 1920 1505 Federal Street
Dallas, Texas 75221-1920 Dallas, Texas 75201

Lincoln Placeholder Limited Partnership
P. O. Box 1920 1505 Federal Street
Dallas, Texas 75221-1920 Dallas, Texas 75201

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Limited Partnership of EQR/Lincoln Limited Partnership, as of November 13th, 1997.

GENERAL PARTNERS:

Lincoln Eastern Management Corporation
a Texas corporation

Dan Jacks, Vice President

Lincoln Placeholder Limited Partnership
a Texas limited partnership

By: Lincoln Eastern Management Corporation
a Texas corporation, its general partner

Dan Jacks, Vice President

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 03:00 PM 11/19/1997
971395197 - 2821007

CERTIFICATE OF CORRECTION FILED TO CORRECT A CERTAIN ERROR IN THE CERTIFICATE OF LIMITED PARTNERSHIP OF EQR/LINCOLN LIMETED PARTNERSHIP FILED IN THE OFFICE OF THE SECRETARY OF STATE OF DELAWARE ON NOVEMBER 13, 1997.

250

EQR/Lincoln Limited Partnership, a limited partnership organized and existing under and by virtue of the Delaware Limited Partnership Act

DOES HEREBY CERTIFY:

1. The name of the limited partnership is EQR/Lincoln Limited Partnership.

2. That a Certificate of Limited Partnership was filed by the Secretary of State of Delaware on November 13, 1997 and that said Certificate required correction as permitted by Section 17.213 of the Delaware Limited Partnership Act of the State of Delaware.

3. The inaccuracy or defect of said Certificate to be corrected is as follows: listing of Lincoln Eastern Management Corporation, a Texas corporation and Lincoln Placeholder Limited Partnership, a Texas partnership, as General Partners.

4. The execution, sealing or acknowledgment of the Certificate is corrected as follows: the sole General Partner is

Lincoln Eastern Management Corporation, a Texas corporation
P. O. Box 1920 — 1506 Federal Street
Dallas, Texas 75221-1920 — Dallas, Texas 75201

IN WITNESS WHEREOF, said EQR/Lincoln Limited Partnership has caused this Certificate to be signed by Lincoln Eastern Management Corporation, its General Partner, this 19th day of November, 1997.

GENERAL PARTNER:

Lincoln Eastern Management Corporation, a Texas corporation

By _____
Dan Jacka, Vice President

LIMITED PARTNERSHIP AGREEMENT

OF

EQR/LINCOLN LIMITED PARTNERSHIP

THE PARTNERSHIP INTERESTS REFERRED TO HEREIN HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY OTHER SECURITIES LAWS

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THIS LIMITED PARTNERSHIP AGREEMENT (this "Agreement") of EQR/LINCOLN LIMITED PARTNERSHIP (the "Partnership") is hereby made and adopted effective as of November 13, 1997, by and among LINCOLN EASTERN MANAGEMENT CORPORATION, a Texas corporation (in its capacity as a general partner of the Partnership, "Eastern GP", and in its capacity as a limited partner, "Eastern LP"), and LINCOLN PLACEHOLDER LIMITED PARTNERSHIP, a Texas limited partnership (the "Lincoln Placeholder"). Eastern GP and Eastern LP are herein sometimes collectively and individually referred to as "Eastern".

RECITALS

A. Eastern and the Lincoln Placeholder desire for the Partnership to be operated for the purposes of providing services (as more particularly defined below, the "Services") relating to multi-family residential real estate projects (as more particularly defined below, "Projects"). Such Services may include but are not limited to the acquisition, development, construction, management and disposition of Projects and the negotiation and administration of various financing arrangements or funds relating to Projects, among other activities.

B. A Certificate of Limited Partnership for the Partnership was filed on November 13, 1997, in the Office of the Secretary of State of the State of Delaware. This Agreement is entered into pursuant to that certain Formation Agreement (the "Formation Agreement") dated as of November 19, 1997, executed by Eastern and ERP Operating Limited Partnership ("ERP") or their respective Affiliates.

C. As described in the Formation Agreement, Eastern and the Lincoln Placeholder desire each to own fifty percent (50%) of the Partnership, with Eastern or one or more of its Affiliates contributing to the Partnership certain Service & Development Contracts, as defined below, together with Eastern's expertise and capability, among other things, with respect to the business of providing Services to Projects. The parties further desire to grant to ERP or one or more of its Affiliates (as defined below) a fifty percent (50%) interest in the net profits of the Partnership, as more particularly provided in that certain Profit Participation Agreement dated effective as of January 1, 1998, to be entered into between the Partnership and ERP or its Affiliate

shall be deemed to refer to the masculine, feminine or neuter, singular or plural, as the identity of the person or entity may require. Unless the context requires otherwise, all references in this Agreement to Sections or Articles shall be deemed to mean and refer to Sections and Articles in this Agreement. The Partners hereby waive any right that they may have to cause a partition of Partnership assets. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. Furthermore, in lieu of each such illegal, invalid or unenforceable provision, there shall be substituted a provision as similar in effect to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and said counterparts shall constitute but one and the same agreement which may be sufficiently evidenced by one counterpart.

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IN WITNESS WHEREOF, the undersigned, being all of the Partners of the Partnership, have caused this Agreement to be duly adopted by the Partnership effective as of November 13, 1997.

GENERAL PARTNER:

LINCOLN EASTERN MANAGEMENT CORPORATION,
a Texas corporation

By: _____
A. Mack Pogue
Chairman of the Board

LIMITED PARTNERS:

LINCOLN EASTERN MANAGEMENT CORPORATION,
a Texas corporation

By: _____
J. Timothy Byrne
President

[SIGNATURES CONTINUED ON NEXT PAGE]

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP,
a Texas limited partnership

By: Lincoln Eastern Management Corporation,
a Texas corporation

By: _____
Name: _____
Its: _____
TIM BYRNE
PRESIDENT

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Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Articles Of Incorporation for LINCOLN EASTERN MANAGEMENT CORPORATION (filing number: 121374000), a Domestic Business Corporation, was filed in this office on December 06, 1991.

254

It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

255

LINCOLN EASTERN MANAGEMENT CORPORATION
Filing Number: 121374000

Articles Of Incorporation	December 06, 1991
Public Information Report (PIR)	December 31, 2000
Public Information Report (PIR)	December 31, 2002

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

FILED
In the Office of the
Secretary of State of Texas
DEC 06 1991
Corporations Section

ARTICLES OF INCORPORATION

OF

LINCOLN EASTERN MANAGEMENT CORPORATION

---oOo---

We, the undersigned natural persons of the age of eighteen years or more, acting as incorporators of a corporation under the Texas Business Corporation Act, do hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is

LINCOLN EASTERN MANAGEMENT CORPORATION

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized are:

To engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is Ten Thousand (10,000) common shares of the par value of One Dollar ($1.00) each (or without par value).

Cumulative voting rights are denied to all shareholders.

Preemptive rights to acquire additional shares of the corporation are denied to all shareholders.

ARTICLE FIVE

The corporation will not commence business until

it has received for the issuance of its shares consideration of the value of One Thousand Dollars ($1,000.00), consisting of money, labor done or property received.

ARTICLE SIX

The street address of its initial registered office is 350 N. St. Paul Street, c/o C T CORPORATION SYSTEM, Dallas, Texas 75201, and the name of its initial registered agent at such address is

C T CORPORATION SYSTEM

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the By-Laws.

The number of directors constituting the initial Board of Directors is two (2), and the name and address of each person who is to serve as director until the first annual meeting of the shareholders or until a successor is elected and qualified are:

NAME	ADDRESS
Mack Fogus	1505 Federal Street Dallas, Texas 75201
Timothy Byrne	1505 Federal Street Dallas, Texas 75201

ARTICLE EIGHT

The names and addresses of the incorporators are:

NAME	ADDRESS
M. S. Green	350 N. St. Paul Street Dallas, TX 75201
J. P. Goins	350 N. St. Paul Street Dallas, TX 75201

IN WITNESS WHEREOF, we have hereunto set our hands, this 5th day of December, 1991.

M. S. Green

J. F. Goins

STATE OF Texas

COUNTY OF Dallas

I, Joann K. Washington, a Notary Public do hereby certify that on this 5th day of December, 1991, personally appeared before me, M. S. Green and J. F. Goins, who each being by me first duly sworn, severally declared that they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

Joann K. Washington
Notary Public

(NOTARIAL SEAL)

JOANN K. WASHINGTON
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 1-27-92

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the document, Certificate Of Limited Partnership for LINCOLN PLACEHOLDER LIMITED PARTNERSHIP (filing number: 10285210), a Domestic Limited Partnership (LP), was filed in this office on November 14, 1997.

259

It is further certified that the entity status in Texas is active.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Gwyn Shea
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

260

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP
Filing Number: 10285210

Certificate Of Limited Partnership — November 14, 1997

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on April 24, 2003.

Gwyn Shea
Secretary of State

Come visit us on the internet at http://www.sos.state.tx.us/
PHONE(512) 463-5555 FAX(512) 463-5709 TTY7-1-1
Prepared by: Debbie Melvin

CERTIFICATE OF LIMITED PARTNERSHIP

FOR

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP

FILED
In the Office of the
Secretary of State of Texas
NOV 14 1997
Corporation

The undersigned, being all of the General Partners of a limited partnership to be formed pursuant to the requirements of the Texas Revised Limited Partnership Act, Article 6132a of the Revised Civil Statutes of the State of Texas, hereby certify as follows:

1. Name. The name of the Partnership is LINCOLN PLACEHOLDER LIMITED PARTNERSHIP.

2. Principal Office. The address of the principal office in the United Sates of the partnership is:

3300 Lincoln Plaza
500 North Akard
Dallas, Texas 75201.

3. Registered Office and Registered Agent. The name and address of the registered agent for service of process is:

Nancy Davis
3300 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

4. Names/Addresses of General Partners. The names, mailing and business street addresses of the general partners are:

Lincoln Eastern Management Corporation
P. O. Box 1920 — Dallas, Texas 75221-1920
1505 Federal Street — Dallas, Texas 75201

IN WITNESS WHEREOF, the undersigned have executed this Certificate this 13th day of November, 1997.

Lincoln Eastern Management Corporation
a Texas corporation, a general partner

By: _____
Dan Jacob, Vice President

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GRANTOR INDEX

AGREEMENT

OF LIMITED PARTNERSHIP

OF

LINCOLN PLACEHOLDER LIMITED PARTNERSHIP

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This Agreement of Limited Partnership ("Agreement") is made and entered into as of the 1st day of November, 1997 by, between and among the entity signing below as Managing General Partner ("Managing General Partner") (the Managing General Partner is sometimes hereinafter referred to as a "General Partner," which term as used herein shall also apply to any persons or entities, if any hereafter admitted to the Partnership as a general partner), and the persons or entities signing below as Limited Partners (each of the foregoing being sometimes hereinafter referred to individually as a "Limited Partner" and collectively as the "Limited Partners"). The General Partner and the Limited Partners are sometimes hereinafter referred to individually as a "Partner" and collectively as the "Partners".

1. Formation and Name. The Partners hereby form a limited partnership under the name of Lincoln Placeholder Limited Partnership (the "Partnership") pursuant to the provisions of the Revised Limited Partnership Act of Texas (the "Act"). The "Managing General Partner," as defined in Section 9.1. below, may at any time change the name of the Partnership or adopt such trade or fictitious names as it may determine.

2. Capital.

2.1. Original Capital. The original capital of the Partnership shall consist of $100 cash, which shall be contributed by the Partners in the percentages set forth opposite their signatures hereto, subject however to the provisions of Section 2.3. (a) below. No Partner has contributed property other than cash to the Partnership. Each Partner, whether a General Partner or a Limited Partner, shall have an interest in the Partnership which shall be expressed in terms of a percentage of the whole, with the present Percentage Interests as defined in Section 6.1. being set forth opposite their signatures hereto.

2.2. Additional Funds.

(a) Except as provided in Section 2.2. (b) below, any additional funds required by the Partnership to meet its cash requirements shall be borrowed by the Partnership from third parties upon such terms and conditions as the Managing General Partner, in its discretion, deems necessary or appropriate; provided, however, that in lieu of causing the Partnership to borrow from third parties, any one or more of the Partners, with the approval of the Managing General Partner, may from time to time make advances to the Partnership to meet such cash requirements, which such advances shall be repaid on demand on a fully recourse basis and shall bear simple interest at a rate equal to the lesser of (i) one percent (1%) per annum in

or if acquired in any other name, the agent or nominee shall place a written declaration of beneficial interest in the Partnership's books and records that acknowledges the capacity in which the agent or nominee acts and that the Partnership is the true or equitable owner. Such declaration of beneficial interest may be in form suitable for recording and may provide that if such agent or nominee shall die, become incapacitated, make an assignment for the benefit of creditors, be adjudicated as bankrupt or insolvent, then, in any such event, the Managing General Partner shall, as said agent's or nominee's irrevocable agent and attorney-in-fact, execute any legal instrument necessary to properly reflect the Partnership's interest.

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5. Term. The term of the Partnership shall continue until terminated or dissolved pursuant to the terms of Section 17.1. hereof.

6. Allocations.

6.1. Certain Definitions. For purpose of this Agreement, the following capitalized terms shall have the meanings set forth below:

"Adjusted Capital Account" means, with respect to a Partner, the balance in such Partner's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments: (i) increase such Capital Account by any amounts which the Partner is obligated to restore or is treated as being obligated to restore pursuant to Section 1.704-1(b)(2)(ii)(c) of the Treasury Regulations; (ii) increase such Capital Account by an amount which the Partner is deemed to be obligated to restore represented by such Partner's share of Partnership minimum gain pursuant to Treasury Regulation Section 1.704.2(g)(1); (iii) decrease such Capital Account by the items described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iv) increase such Capital Account by an amount which the Partner is deemed to be obligated to restore represented by such Partner's share of partner minimum gain pursuant to Treasury Regulation Section 1.704-2(i). This definition shall be interpreted consistently with Treasury Regulation Section 1.704-1(b)(2)(ii)(d).

"Contributing Partner" means the following Partners: Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc.

"Contribution Interest," as to a Contributing Partner, means the following percentages:

Lincoln Eastern Management Corporation	99.5000%
Lincoln E.C.W. Property Management, Inc.	0.5000%
	100.0000%

"Net Income" and "Net Loss" means, for each Fiscal Year or other period, (i) the excess of the Income for such period over the Loss for such period, or (ii) the excess of the Loss for such period over the Income for such period, respectively; provided, however, Net Income and Net Loss for a Fiscal Year shall be computed by excluding from such computation any Income and Loss specially allocated under Section 6.3. (including, but not limited to,

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written by the following Partners, whose respective residence addresses and percentage interests are set forth opposite their respective signatures.

MANAGING GENERAL PARTNER:

Residence Address		Percentage Interest:
3300 Lincoln Plaza 500 N. Akard Dallas, TX 75201	Lincoln Eastern Management Corporation By: _____ Name: DAN M. JACKS Title: Vice President	99.5000%

LIMITED PARTNER:

3300 Lincoln Plaza 500 N. Akard Dallas, TX 75201	Lincoln H.C.W. Property Management, Inc. By: _____ Name: DAN M. JACKS Title: Vice President	0.5000%

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The State of Texas

SECRETARY OF STATE
CERTIFICATE OF INCORPORATION

OF

LINCOLN E.C.W. MANAGEMENT, INC.
CHARTER NO. 1166949

The undersigned, as Secretary of State of Texas, hereby certifies that Articles of Incorporation for the above corporation duly signed pursuant to the provisions of the Texas Business Corporation Act, have been received in this Office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in the Secretary by law, hereby issues this Certificate of Incorporation and attaches hereto a copy of the Articles of Incorporation.

Issuance of this Certificate of Incorporation does not authorize the use of a corporate name in this State in violation of the rights of another under the federal Trademark Act of 1946, the Texas trademark law, the Assumed Business or Professional Name Act, or the common law.

Dated SEPTEMBER 20 ,19 90.

THE STATE OF TEXAS

George S Bayoud Jr.
Secretary of State

dae

FILED
In the Office of the
Secretary of State of Texas

SEP 20 1990

Corporations Section

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ARTICLES OF INCORPORATION

OF

Lincoln E.C.W. Management, Inc.

---oOo---

We, the undersigned natural persons of the age of eighteen years or more, acting as incorporators of a corporation under the Texas Business Corporation Act, do hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is

Lincoln E.C.W. Management, Inc.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purpose or purposes for which the corporation is organized are:

To engage in the transaction of any or all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is Ten Thousand (10,000) of the par value of One Dollar ($1.00) each.

ARTICLE FIVE

The corporation will not commence business until it has received for the issuance of its shares consideration of the value of One Thousand Dollars ($1,000.00), consisting of money, labor done or property received.

ARTICLE SIX

The street address of its initial registered office is 350 N. St. Paul Street, c/o C T CORPORATION

SYSTEM, Dallas, Texas 75201, and the name of its initial registered agent at such address is

C T CORPORATION SYSTEM

ARTICLE SEVEN

The number of directors of the corporation may be fixed by the By-Laws.

The number of directors constituting the initial Board of Directors is Two (2), and the name and address of each person who is to serve as director until the first annual meeting of the shareholders or until a successor is elected and qualified are:

NAME	ADDRESS
Mack Pogue	1303 Federal Street Dallas, Texas 75201
Timothy Byrne	1303 Federal Street Dallas, Texas 75201

ARTICLE EIGHT

The names and addresses of the incorporators are:

NAME	ADDRESS
L. B. LeBaron	350 N. St. Paul Street Dallas, TX 75201
D. C. Sweeney	350 N. St. Paul Street Dallas, TX 75201

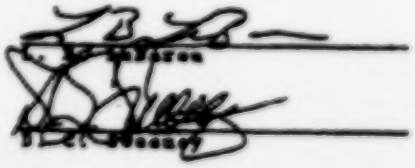
ARTICLE NINE

The shareholders of the corporation are expressly denied the right of cumulative voting.

ARTICLE TEN

The preemptive rights of the shareholders of the corporation are expressly denied.

IN WITNESS WHEREOF, we have hereunto set our hands, this Nineteenth day of September, 1990.



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STATE OF TEXAS

COUNTY OF DALLAS

I, Joann H. Washington, a Notary Public do hereby certify that on this Nineteenth day of September, 1990, personally appeared before me, L. B. LeBaron and B. C. Sweeney, who each being by me first duly sworn, severally declared that they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

Notary Public

(NOTARIAL SEAL)

JOANN H. WASHINGTON
Notary Public
STATE OF TEXAS
My Commission Expires 1-27-94

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The State of Texas

SECRETARY OF STATE

CERTIFICATE OF AMENDMENT
OF

LINCOLN E.C.W. PROPERTY MANAGEMENT, INC.
FORMERLY:
LINCOLN E.C.W. MANAGEMENT, INC.

The undersigned, as Secretary of State of the State of Texas, hereby certifies that the attached Articles of Amendment, duly signed, have been received in this Office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in the Secretary by law, issues this Certificate and attaches hereto a copy.

Dated October 5 19 90

THE STATE OF TEXAS

George S Bayoud Jr.
Secretary of State

FILED
In the Office of the
Secretary of State of Texas

OCT 5 1990

Corporations Section

ARTICLES OF AMENDMENT

TO THE

ARTICLES OF INCORPORATION

OF

LINCOLN E.C.W. MANAGEMENT, INC.

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Pursuant to the provisions of Art. 4.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

ARTICLE ONE: The name of the corporation is LINCOLN E.C.W. MANAGEMENT, INC.

ARTICLE TWO: The following amendment to the Articles of Incorporation was adopted by the shareholders of the corporation on October 2, 1990:

> Article One of the Articles of Incorporation is hereby amended so as to read as follows: The name of the corporation is LINCOLN E.C.W. PROPERTY MANAGEMENT, INC.

ARTICLE THREE: The number of shares of the corporation outstanding at the time of such adoption was One Thousand (1,000); and the number of shares entitled to vote thereon was One Thousand (1,000).

ARTICLE FOUR: The holders of all of the shares outstanding and entitled to vote on said amendment have signed a consent in writing adopting said amendment.

Dated October 4, 1990

LINCOLN E.C.W. MANAGEMENT, INC.

John W. Pritchett, Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant.

February 13, 2003

DEPOSITION OF:

FRED E. CHANEY

was called for examination by Counsel for the Plaintiff, pursuant to Notice, taken at the law offices of Jerry M. Phillips, Esquire, Phillips, Beckwith, Hall & Chase, 10513 Judicial Drive, Suite 100, Fairfax, Virginia 22030, commencing at 1:10 p.m., on the 13th day of February, 2003, before Mary Silverthorne, a Notary Public in and for the State of Virginia, at Large, when were present on behalf of the respective parties:

* * * * *

[4] PROCEEDINGS

Thereupon,

FRED E. CHANEY

the witness, called for examination by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF
BY MR. PHILLIPS:

Q Would you please state your name and address?

A Fred Chaney, 4028 Centenary – that's C-e-n-t-e-n-a-r-y – Dallas, Texas.

Q And would you please tell us what your occupation is and your position?

A I am property manager for Lincoln Property Company and Senior Vice President.

Q And do you sit on the board of Lincoln Property?

A We're a partnership. I am a partner in new deals. We don't have a board.

Q And this is a limited liability corporation or company?

A We have multiple structures that we [5] operate under.

Q And where is the corporate headquarters?

A Dallas, Texas.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (JBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY COMPANY, ET AL.,
Defendants.

Monday, March 3, 2003
Vienna, Virginia

Deposition of:

JOHN LeBEAU

a witness, called for examination by counsel on behalf of the Plaintiffs, pursuant to notice, taken in the law offices of Venable, Baetjer, Howard & Civiletti, 8002 Towers Crescent Drive, Vienna, Virginia, beginning at approximately 2:20 o'clock p.m., before William L. Finley, Verbatim Reporter and Notary Public in and for the Commonwealth of Virginia, when there were present on behalf of the respective parties:

* * * * *

[20]

* * * * *

[BY MR PHILLIPS:]

Q Is there anyone higher ranking than you at this regional office, as far as supervisory or management authority?

MS. BERTRAM: Objection; vague.

BY MR. PHILLIPS:

Q In other words, who is the highest ranking officer at that office?

MS. BERTRAM: Same objection.

BY MR. PHILLIPS:

Q Today, I mean. Right now.

A Jeff Franzen.

Q Jeff –

A Franzen.

Q And does he work out of the Herndon office?

A Yes.

Q And how long has he been there?

A I don't know.

Q Has he been there since you started in 1999?

A Yes.

Q And that's F-r-a-n-z-e-n?

[21]

A Yes.

Q And what's his title?

A Senior Vice President, Partner.

Q He is a partner in Lincoln Property Company; correct?

MS. BERTRAM: Objection to the extent it calls for speculation.

BY MR. PHILLIPS:

Q Is that correct?

A I don't know what he is a partner of.

Q Well, you report to him?

A Somewhat.

Q Who is your direct report?

A Fred Cheney.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Apr. 29, 2003]

DECLARATION OF JEFF FRANZEN

Jeff Franzen, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am a Vice President for Lincoln Eastern Management Corporation. In addition, I am referred to as a "Partner" because I am a partner in several Texas limited partnerships that are involved in the acquisition and development of properties.

3. However, I have never been a partner in EQR/Lincoln Limited Partnership. In addition, I am not a partner in any entity that is responsible for managing or that receives management fees for Westfield Village apartments.

I declare under penalty of perjury that the information in this Declaration is true and correct.

4/29/03
Date

/s/ JEFF FRANZEN
Jeff Franzen

[Attachments To May 11, 2003 Pleading – Excerpt]

[from website:
http://www.lincolnapts.com/AboutLPC/CorporateLeaders.cfm
(dated 5/12/03)]

Lincoln Property Company

Corporate *Leaders*

About LPC

Corporate Leaders

Regional Offices

Clients

- **Mack Pogue**, Chairman
- **Tim Byrne**, President
- **Brian Byrne**, Senior Vice President – Western Midwest
- **Jeffry T. Courtwright**, Senior Vice President – Southwest
- **Reggie D. Delponte**, Senior Vice President – California
- **Jeff B. Franzen**, Senior Vice President – Mid Atlantic
- **Kevin Keane**, Senior Vice President – Eastern Midwest
- **Charles O. Shallat**, Senior Vice President – Southeast
- **Anthony V. Ianuale Jr.**, Vice President – Northeast
- **John Noone**, Vice President
- **David C. Martin**, Vice President Acquisitions – Southwest
- **Dennis Streit**, Chief Financial Officer
- **Fred E. Chaney**, Senior Vice President – Property Management
- **Billy J. Grant, Jr.**, Senior Vice President – Construction
- **Dan M. Jacks**, Senior Vice President/General Counsel
- **Brian K. Austin**, Vice President – Finance & Analysis
- **Maria Lawson**, Vice President – Marketing and Training

Mack Pogue, Chairman

Mack Pogue, Chairman and Chief Executive Officer of Lincoln Property Company, formed the company in 1965 to develop, own and manage top caliber real estate properties. Since that time, Mr. Pogue has developed more

than $17 billion in residential, commercial, and retail properties throughout the United States and Europe. Mr. Pogue remains an active and integral part of the decision making process for each development and personally reviews projects through each major phase of planning, financing, design and construction.

Back to top.

Tim Byrne, President

Tim Byrne is the President and Chief Executive Officer of Lincoln Property Company's Residential Division. He is actively involved in the decision-making, development and review of all projects, from early planning stages through financing, design, construction and lease-up. Since joining Lincoln as President in 1984, Mr. Byrne has been responsible for the development and planning of over 45,000 units and oversees the management of the Lincoln portfolio throughout the country.

Mr. Byrne joined Lincoln Property Company from the Dallas-based Byrne Company, a residential and commercial development company he founded in 1976. A native of Dallas, Mr. Byrne received a degree in business administration from the University of Texas. Mr. Byrne sits on various community boards and is a member of the Board of Directors of the National Multi Housing Council, the Urban Land Institute and past Board Member of the Real Estate Council.

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Brian Byrne, Senior Vice President – Western Midwest

Brian Byrne is Senior Vice President and Operating Partner for Lincoln Property Company – Midwest. His responsibilities include development, acquisition and management oversight of Lincoln's operations in the Midwest.

He is also responsible for tracking market conditions, which affect properties under Lincoln's management.

Mr. Byrne joined Lincoln in 1985 as Development Manager where he worked with the Operating Partners to oversee the development process for all new projects. He became Senior Vice President/Operating Partner in 1991. Prior to his association with Lincoln Property Company, Mr. Byrne was the Vice President of Development at Byrne Development Company from 1981 to 1985. His responsibilities included overseeing all planning, development, design and construction processes. Mr. Byrne graduated from Texas Tech University with a Bachelor of Architecture degree in 1974. He is a registered architect and holds a National Council of Architectural Registration Board Certification. He is a member of the Urban Land Institute and the American Institute of Architects.

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Jeffry T. Courtwright, Senior Vice President – Southwest

Jeff Courtwright is Senior Vice President and Operating Partner for Lincoln Property Company – Southwest. His responsibilities include development, acquisition and management oversight of Lincoln residential operations in the Southwest.

Mr. Courtwright joined Lincoln's commercial division in 1987. He was promoted to Vice President of Office Development in 1991 for office projects in the Dallas/Fort Worth area. In 1993, Mr. Courtwright was named Senior Vice President and expanded his responsibilities to include acquisitions of non-performing loans and distressed assets as well as regional management companies and oversight of facilities management contracts. Mr. Courtwright left Lincoln in 1995 to join Prentiss Properties as Managing Director of the Southwest U. S. commercial operations. He returned to Lincoln in his current capacity

in October 1996. A licensed real estate broker, Mr. Courtwright is a graduate of Southern Methodist University, a former member of the Central Association's Executive Committee, and a council member of the National Association of Industrial and Office Parks.

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Reggie D. Delponte, Senior Vice President – California

Reg DelPonte is Senior Vice President and Operating Partner for Lincoln Property Company – California. Mr. DelPonte opened the Western Region office in September 1998. His responsibilities include all residential development in California as well as acquisition of existing properties or portfolios. Since opening the office, he has developed over 2,000 multi-family units and acquired a portfolio of 3,500 existing units.

Prior to joining Lincoln, Mr. DelPonte was President of Calco Investments and in 1983 formed DelPonte Companies, which developed mixed use commercial and industrial business parks with a total of 2.5 million square feet of development. Mr. DelPonte began his real estate career as a commercial real estate broker with Grubb & Ellis Commercial Brokerage Company in 1979 where he received numerous awards, including Overall Top Producer for two consecutive years.

Mr. DelPonte is a native of Denver and a member of the Urban Land Institute.

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Jeff B. Franzen, Senior Vice President – Mid Atlantic

Jeff Franzen is Senior Vice President and Operating Partner for Lincoln Property Company – Northeast/MidAtlantic. Mr. Franzen opened the Washington DC office for Lincoln in 1985 and directs all of Lincoln's

residential operations from New England to North Carolina. His region currently manages over 12,500 apartment units.

Mr. Franzen currently serves on the Boards of the National Multi-Housing Council [*sic*] the Women's Center of Northern Virginia and is active in the Urban Land Institute serving as Vice Chairman of the Program Council. A native of Dallas, Mr. Franzen received a BBA from Southern Methodist University in 1976 and an MBA from the University of Dallas in 1979. Mr. Franzen is licensed as a real estate broker in most of the eastern United States and is an active CCIM candidate.

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Kevin Keane, Senior Vice President – Eastern Midwest

As Senior Vice President and Operating Partner for the Lincoln Property Company – Midwest, Mr. Keane is responsible for overseeing development, financing and monitoring ongoing property management activities throughout Pennsylvania, Ohio, Michigan, West Virginia and Kentucky. Mr. Keane also tracks market conditions, which affect cities throughout the Midwest markets. He then determines which markets and sub-markets in which to concentrate real estate development and value added real estate investments. Mr. Keane is also involved in the financing, sale, development, construction and management of all the apartment communities in his region.

Prior to joining Lincoln in 1988, Mr. Keane was a Vice President with a mortgage banking company where he was responsible for the placement of institutional equity and debt for existing and to be developed real estate. While employed as a mortgage banker, Mr. Keane procured in excess of $250,000,000 in debt and equity financing for all types of institutional quality income producing properties. Mr. Keane holds a Bachelor of Science in

Business Administration in Real Estate and Insurance from the Pennsylvania State University.

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Charles O. Shallat, Senior Vice President – Southeast

Mr. Shallat is Senior Vice President and Operating Partner for Lincoln Property Company – Southeast. Mr. Shallat is responsible for overseeing development, financing and monitoring on-going property management activities in the Southeast. Since joining Lincoln in 1996, the Southeast region has closed over $300 million in transactions, encompassing both new development and acquisition/rehabilitations. Mr. Shallat's region also manages apartment units for its own account as well as for third parties.

Mr. Shallat joined Lincoln from JPI Development Partners, Inc., where he was the Regional Acquisition Director. He was responsible for the acquisitions of multifamily properties in the Southeast. Prior to JPI, Mr. Shallat was Senior Acquisitions Associate at Metric Realty, an institutional pension fund advisor. Mr. Shallat holds a Bachelor's degree in Economics/Marketing/Management from the University of Illinois, Champaign/Urbana. Mr. Shallat is currently a member of the National Multihousing Counsel and a past Board Member of the East Coast REIAC Chapter.

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Anthony V. Ianuale Jr., Vice President – Northeast

Mr. Ianuale is Vice President and Operating Partner for Lincoln Property Company – Northeast. His responsibilities include all residential development for the Northeast as well as acquisitions of existing properties or portfolios.

Prior to joining Lincoln in 1998, Mr. Ianuale was a Development Director for AvalonBay Communities, a residential REIT. He completed permitting and commenced development of several luxury multi-family developments in the Boston area, Providence, Rhode Island and Connecticut. He worked as a development manager for LaSalle Partners for five years in the early 1980's and was responsible for the development of commercial property including a complete rehabilitation and expansion of the landmark News Building in New York City. After LaSalle Partners, Mr. Ianuale joined the Druker Company, a high-quality developer of mixed-use, office, hotel and residential property based in Boston, Massachusetts. Mr. Ianuale received his BSME (Mechanical Engineering) from the University of Virginia in 1978 and his MBA from the Amos Tuck Graduate School of Business Administration at Dartmouth College in 1980.

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John Noone, Vice President

John J. Noone is a Vice President and Operating Partner for Lincoln Property Company – New England. His responsibilities include all residential development for New England as well as acquisitions of existing residential properties and portfolios.

Prior to joining Lincoln Property Company, Mr. Noone was a Senior Vice President for Sunrise Development Inc., the real estate development subsidiary of Sunrise Assisted Living, Inc., a NYSE publicly traded company. He completed the permitting and construction for all real estate development activities throughout New England and New York. Mr. Noone successfully developed over $250,000,000 worth of new residential development projects on behalf of Sunrise Development, Inc. Mr. Noone has over 16 years experience in urban planning, property management, finance and development.

Mr. Noone graduated Bentley College with a BS in Finance. He serves as Trustee for a not for profit housing corporation, and also serves on the Real Estate Transportation and Development Committee for the Greater Boston Chamber of Commerce. Mr. Noone is a licensed real estate broker in the Commonwealth of Massachusetts.

Back to top.

David C. Martin, Vice President Acquisitions – Southwest

Dave Martin brings sixteen years of real estate and capital markets experience to Lincoln Property Company's multifamily acquisitions efforts in the southwestern U.S.

Prior to his time at Lincoln, Dave was the lead banker in Nomura Asset Capital Corp.'s Dallas, Texas office, which he helped open and staff in July of 1997. Over the course of two years at Nomura, Dave structured and funded in excess of $600M of investments for commercial and residential real estate properties.

Dave began his career in Metropolitan Life Insurance Company's Real Estate Investments Department, and held a number of positions during his 11-year tenure – including two-year assignments in both London, England and MetLife's Real Estate Investment Committee operations in Atlanta, Georgia.

Dave earned an undergraduate degree in finance from Texas A&M University in May 1986, and obtained a Graduate Certificate in finance from Southern Methodist University in May 1997.

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★★★★★

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiff

v.

LINCOLN PROPERTY CO., ET AL.,
Defendant

[filed June 13, 2003]

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PREVIOUSLY FILED MOTION FOR REMAND PURSUANT TO 28 USC 1447(c)

[Introduction and Part I.A omitted]

B. THE EQR/LINCOLN LIMITED PARTNERSHIP ISSUES

Here, remand is required for at least two reasons. First, the three defendants have not been identified as citizens of other than Virginia states at the time of the filing of the Motion for Judgment. (As previously argued, SWIB is an arm of the State and is not a citizen at all for purposes of diversity.) Second, the defendant Lincoln conceded that the real party (which it failed to identify in the Notice as well as in its Financial Disclosure) is EQR/Lincoln Limited Partnership. But, the Notice fails to identify the members of the defendant EQR/Lincoln LLP, and the Notice fails to allege any of the citizenships. [Defendant Lincoln, for the reasons stated above, cannot claim that it has amended its Notice by filing its

Memorandum in Opposition; but, the Court can review the entire record when diversity of citizenship and subject matter jurisdiction is challenged. See *Indianapolis v. Chase National Bank, supra.*] Furthermore, at no time has Lincoln in this record carried its burden to show that the real party of interest, EQR/Lincoln LLP, does not have a principal place of business outside of Virginia. [Even if it attaches another Affidavit challenging this, it comes too late. Lincoln was the architect of its own fatal, jurisdictional disaster by not including this information in the original Notice for Removal.]

Because the Notice fails to allege the jurisdictional requirements, either for the defendant Lincoln, SWIB, Invesco or the real party in action, EQR/Lincoln Limited Partnership, the defendants have failed to allege facts necessary to show both complete diversity and that none of the defendants are citizens of the Commonwealth of Virginia when the Motion for Judgment was filed.

Furthermore, even assuming (as defendants incorrectly do) that EQR/Lincoln Limited Partnership is a citizen only of the states in which it is organized and in which it has its "principal place of business," defendant EQR/Lincoln LLP's "principal place of business" likely is Virginia and not Delaware, or Texas, or any of the other numerous locations of the 'layer upon layer' of corporate entities which comprise "affiliates" [none of this was disclosed in the Financial Disclosure or in the Notice of Removal]. Upon information and belief, EQR/Lincoln Limited Partnership was established and exists for the primary purpose of profiting either from managing fees and ownership of Virginia apartment complexes. Pointing to this is the fact that EQR/Lincoln Limited Partnership filed a Certificate to do business in Virginia (12-29-97) [Ex. 3, Pls. Motion to Remand] shortly after it was organized under the laws of the State of Delaware (11-13-97) [Ex. 1 & 1B, Dfs. Opp.]. Shortly thereafter, Lincoln arranged with SWIB through Invesco, to start managing Westfields Village and other apartment complexes in the Northern Virginia in association with EQR/Lincoln

Limited Partnership. Further buttressing this is that Jeff Franzen [the Virginia citizen], who was disclosed in the discovery pleadings and in published material, as a "partner" with the defendant Lincoln, is not receiving any partnership benefits from EQR/Lincoln LLP. Yet, the Rule 30(b) designated corporate officer, Fred Chaney, testified that Lincoln is in fact a Partnership, which owns and manages Virginia properties through a partnership. This testimony is contradicted by subsequent Affidavits filed in Lincoln's Opposition.

For no other reason than the contradictions, confusions created, failures to disclose financial affiliates as required by the Rules, and the jurisdictional defects above, Lincoln has failed to carry its burden to show diversity. These issues are resolved, for the reasons stated in the argument above, in favor of remand to a court that has assured jurisdiction, namely, the Fairfax County Circuit Court.

If, for no other reason other than the fact that Lincoln failed to name the true party in interest, EQR/Lincoln LLP, in its Notice of Removal, there is a jurisdictional defect. It never disclosed facts of citizenship that would actually permit this Court to determine the citizenship of the limited liability company. The Notice did not identify the members of the LLP, let alone provide facts from which the citizenships of those members could be determined when the Motion for Judgment was filed. As noted above, the time for amending the Notice to include such facts has long passed. Accordingly, on this ground alone, remand is required. And, this is the same finding that Judge Ricardo Urbina reached in *Pauline Johnson-Brown v. 2200 M Street, LLC*, 2003 U.S. Dist. LEXIS 5947 (D. C. 2003), attached as Exhibit 1 to the plaintiffs' original Motion to Remand. There, the District Court ruled that if at any time prior to final judgment it becomes clear that there is a defect in removal procedures, or that the removal court lacks subject matter jurisdiction, the removal court must remand the court to the state court from which the defendants originally removed the case. Because the

defendants there failed to recognize the basic concept that corporate citizenship is limited to corporations, and because the defendants misidentified the citizenship of the LLC defendants, "and so they have failed to prove that the parties are diverse and that the court has subject matter jurisdiction under 28 USC 1441(a) (b). Accordingly, the Court grants the plaintiffs' Motion to Remand the case to the Superior Court." *Id.*

Judge Urbina recognized that the defendants misidentified their citizenship by misapplying the corporate-citizenship standard, and that the court therefore could not exercise jurisdiction over the matter. He followed the Supreme Court standard that he strictly construe removal status because of federalism concerns, citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). He also recognized that, as here, where a removing party's jurisdictional allegations are challenged, that party bears the burden of proving these allegations by a preponderance of the evidence. "Where the need to remand is not self-evident, the court must resolve any ambiguities concerning the propriety of removal in favor of remand. *University of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *Nwachukwu v. Karl*, 223 F. Supp. 2d 60, 66 (D. D.C. 2002). Finally, the defendants bear the burden of proving the propriety of removal, and if the defendant cannot meet this burden, the Court must remand the case. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Nat'l Org. for Women v. Mutual of Omaha Ins. Co.*, 612 F. Supp. 100, 101 (D. D.C. 1985) *(Flannery J.); Gateway 2000, Inc. v. Cyrex Corp.*, 942 F. Supp. 985, 989 (D. N.J. 1996)." *Johnson-Brown, supra.*

Perhaps the defendants were ready to gamble that any jurisdictional defect, in this case, the absence of complete diversity, would escape detection, then disappear prior to judgment. Or, perhaps they did not see the likely outcome of an unwarranted removal – a swift and non-reviewable remand order pursuant to 28 USC §§ 1447(c)(d), which could be attended by the invoking of

payment of costs pursuant to the statute because this Court's authority has been improperly invoked.

The missing allegations in the Notice cannot now be furnished; they are jurisdictional omissions. An effort to characterize their presentation as a mere bolstering of the "specificity" in their original Notice would be disingenuous. See *Black & Decker v. Twin City Fire Insurance Co.*, 1993 U. S. Dist. LEXIS 2838 (D. Md. 1993), citing *Hubbard v. Tripp, supra.* In *Castle & Big South Mining & Construction Company, Inc. v. Laurel Creek Co., Inc.*, 848 F.Supp. 62 (S.D. W. Va. 1994) the court denied leave to amend a removal notice after the 30 days:

> ". . . . the overwhelming majority of courts allow amendment after expiration of the statutory period for removal only for the purpose of setting forth more specifically *each* ground for removal which had been imperfectly set forth in the original petition. *Thompson v. Gillen*, 491 F.Supp. 24, 27 (E.D. Va. 1980), *Van Horne*[*v. Western Electric Co.*], 424 F.Supp. [1920,] 924 [(E. D. Mich. 1977)] (and cases cited therein), but deny leave to amend to supply missing allegations or to supply new allegations. *Thompson*, 491 F. Supp. at 27; *Richmond, Fredericksburg and Potomac R. Co.* [*v. Intermodal Services, Inc.*], 508 F. Supp. [804] 805 [(E.D. Va 1981)]." (emphasis added in original.) *Castle*, 848 F. Supp. at 64.

The court followed the restricted standard and stated that the appropriateness of the restricted position is buttressed by the clear and undisputed rule that removal statutes must be strictly construed *against removal.* "For example, in *Griffin v. Holmes*, 843 F. Supp. 81 (E. D. N.C. 1993), the court stated that when evaluating a motion for remand, it is the general rule that the 'removal statutes are to be strictly construed against removal, with any doubt in a particular case to be resolved against removal.'" (Citations omitted) *Id.* at 65.

The courts are uniformly strict on these jurisdictional issues. Pleading residency instead of citizenship would

not meet the jurisdictional requirement. Because there is a dispute as to the diverse citizenship of the parties, it is even more critical that the Notice for Removal permit the Court to know that both at the time the suit was commenced, and at the time of the Notice of Removal, that all the parties were citizens of diverse states. The Fourth Circuit District Courts have uniformally [*sic*] held that that is a jurisdictional, not a procedural, defect. See cases cited above.

In *Widdon Farms, Inc. v. Delta and Pine Land Company, et al.*, 103 F. Supp. 2d 1310 (S. D. Ala. 2000), the court held that an inadequate jurisdictional allegation in a notice of removal is, by its terms, a jurisdictional defect. It held that to properly invoke federal diversity jurisdiction, the notice of removal must provide all the requisite factors of diversity jurisdiction at the time removal is attempted. The court held that where a notice of removal fails to identify jurisdictional elements, it is unlikely that the court could determine whether there is complete diversity between the parties. In such a situation, the court held that it must remand the case because the removing defect has not met its burden of demonstrating the propriety of the removal. "All doubts about jurisdiction should be resolved in favor of remand to state court." *University of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

In 1991, two cases decided in the Pennsylvania Eastern District Court followed *Hubbard v. Tripp, supra*, in holding that even though the plaintiffs had not moved to remand, the court picked up on the jurisdictional defect when it realized that the Notice of Removal did not state the citizenship of the parties at the time the action was filed, and it was not disclosed in the complaint. The court in both of those cases held that subject matter jurisdiction could not be agreed to or conferred by consent of the parties. "A court is required to address the issue, particularly when it is raised on the face of the record." *Fox v. Kelly & Long Cable Electronics, Inc.*, 1991 U.S. Dist. LEXIS 5382 (E. D. Pa., Apr. 23, 1991); and *Burns v. G. S.*

Nelson Electric, et al., 1991 U.S. [*sic*] LEXIS 6259 (E. D. Pa., May 6, 1991). In both of these cases, the court referred to *Hubbard, supra*. In each case, the court held that since the complaint and the removal notice failed to allege a necessary jurisdictional fact, it had no jurisdiction. In reciting the familiar principle that removal statutes are to be strictly construed against removal and all doubts will be resolved in favor of remand, both actions were returned to state court.

SUMMARY

1. For the reasons stated above, the omission of the jurisdictional requirement to state the citizenship of the parties at the time the action was filed, this matter should be remanded.

2. Lincoln is a partnership whose diversity of citizenship has not been clearly shown; the real party is a limited liability partnership named EQR/Lincoln Limited Partnership whose principal place of business has never been averred or established in this record, and accordingly this Court cannot determine from the record whether it is a diverse party.

3. SWIB is a state agency. As an arm of the State of Wisconsin, it cannot be a "citizen" under the strictly construed, limited jurisdiction mandates of the United States Supreme Court and the Fourth Circuit Court of Appeals. Federalism and state sovereignty concerns in the Fourth Circuit mandate remand under these circumstances.[2]

Respectfully submitted,
CHRISTOPHE ROCHE
JUANITA ROCHE
By Counsel

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[2] It is respectfully requested that these arguments are applicable to the initial Motion to Remand under 28 USC Section 1447(c), or if the Court has entered a Final Judgment at the time this Memorandum has been filed, then under the Rule 60(b)(4) Motion to void a judgment for lack of subject matter jurisdiction.

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[certificate of service omitted]